LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
DEC 23 1971
E. ROBERT SEAVER, CLERK

APPENDIX

Supreme Court of the United States

TERM, 1971

No. 71-322

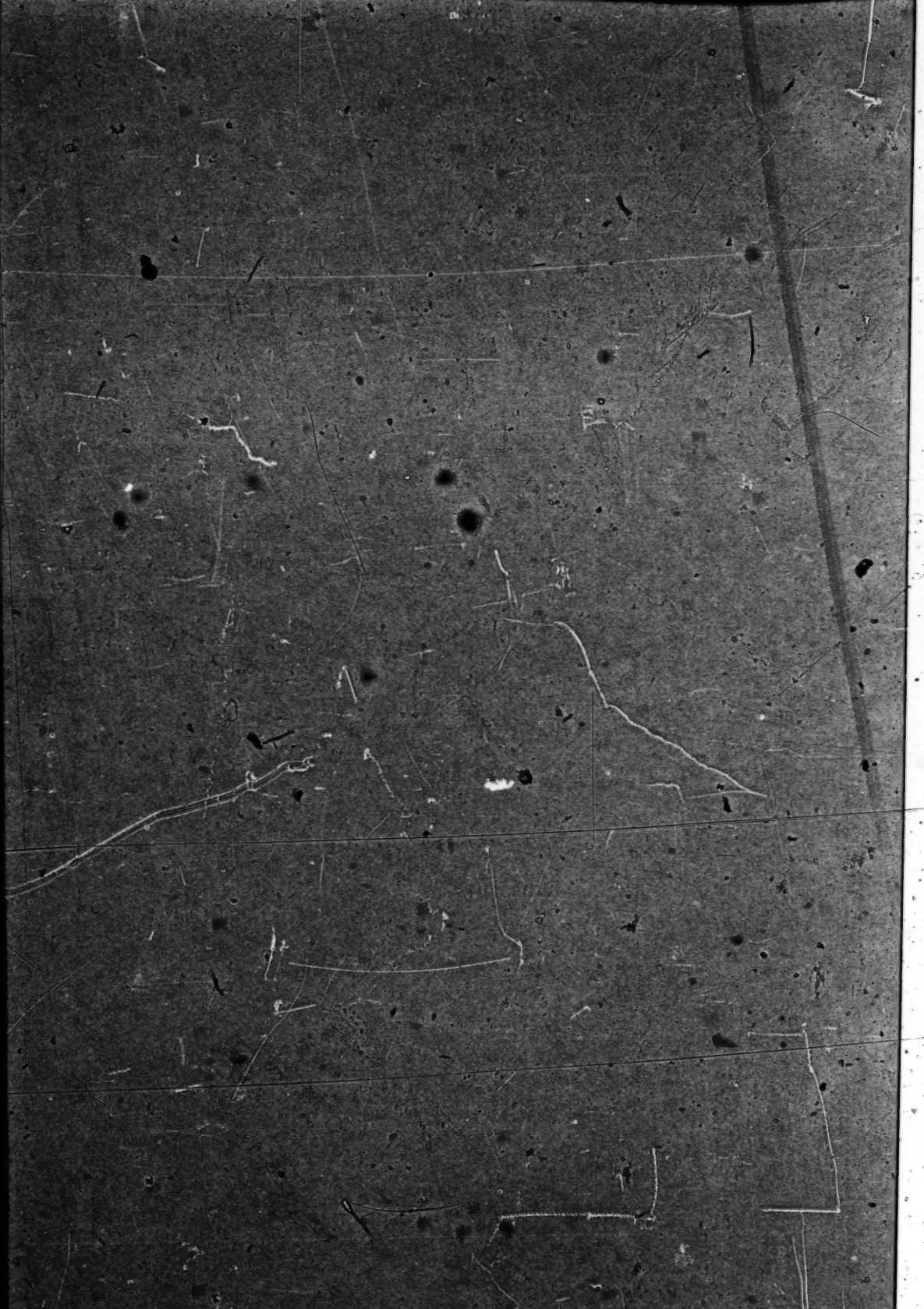
M/S BREMEN AND
UNTERWESER REEDEREI, GMBH,
Petitioner,

vs.

ZAPATA OFFSHORE COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 1, 1971
CERTIORARI GRANTED NOVEMBER 9, 1971



PRELIMINARY STATEMENT TO APPENDIX

THE ORIGINAL RECORD IN THIS CAUSE WAS DESTROYED BY A FIRE WHICH OCCURRED IN THE CLERK'S OFFICE OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT. THE RECORD CERTIFIED BY THAT COURT CONSISTS OF THE PRINTED APPENDIX FILED IN THE CAUSE BEFORE THE FIFTH CIRCUIT AS WELL AS THE ORDERS AND OPINIONS OF THAT COURT. THIS APPENDIX TO BE USED IN THE SUPREME COURT CONSISTS OF A REPRINTING OF THE FIFTH CIRCUIT APPENDIX TO WHICH HAS BEEN INCLUDED THE OPINIONS AND ORDERS OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT. ADDITIONALLY, PURSUANT TO STIPULATION OF THE PARTIES ALREADY FILED IN THE SUPREME COURT, THE APPENDIX INCLUDES CERTAIN SUPPLEMENTAL DOCUMENTS NOT IN THE RECORD WHICH WERE PRESENTED ALONG WITH SUPPLEMENTAL BRIEFS ON REHEARING EN BANC PURSUANT TO THE FIFTH CIRCUIT'S REQUEST FOR ADVICE CONCERNING THE CIRCUMSTANCES SURROUNDING THE UNDERWRITING INSURANCE WITH RESPECT TO THE VOYAGE OF THE M/S BREMEN AND THE CHAPARRAL. THIS SUPPLEMENTAL MATERIAL IS CONTAINED IN PAGES 295 TO 335 OF THE APPENDIX.

INDEX

	Page
Docket Entries: Case No. 68-21 Civ-T	1
Docket Entries: Case No. 68-290 Civ-T	5
Complaint: Zapata Off-Shore Company vs: M/S BREMEN and Unterweser Reederei	7
Notice of Taking Depositions upon Oral Examination	11
Notice of Taking Depositions upon Oral Examination	13
Motion for Protective Order	15
Letter of Undertaking	17
Claim of Owner	19
Motion to Dismiss, to Decline Jurisdiction or to Stay Prosecution	19
Exhibit A	21
Exhibit 1	24
Motion for Protective Order and Order Quashing Subpoenae	28
Motion to Compel Defendant to Proceed with Depositions	31
Notice of Taking Depositions	34
Notice of Taking Depositions upon Oral Examination	35
Motion for Production of Documents	37
Amended Notice of Taking Depositions	41
Notice of Taking Depositions	43
Memorandum Brief: Part I, II and III	44
Exhibit B	46

INDEX (Continued)

	Page
Amended Memorandum of Plaintiff in Opposition to Defendant's Motion to Dismiss, to Decline Jurisdiction or to Stay: Statement of Fact and Affidavit	50
Affidavit of Carl R. Apthorp	58
Certificate of Registry	61
Affidavit of Hoyt Taylor	62
Affidavit of Fergus Dingwall Bateson	65
Exhibit 1	71
Exhibit FDB 2	76
Notice of Reliance Upon Foreign Law	80
Memorandum and Order	80
Motion to Certify Question	83
Order on Motion to Certify Question	84
Complaint: Exoneration from or Limitation of Liability	85
Ad Interim Stipulation	94
Notice of Reliance Upon Foreign Law	97
Order for Monition and Restraining Order	97
Monition	100
Claim	102
Answer	104
Objection to Claim and Counterclaim	110
Reply to Counterclaim	116
Motion for Injunction	118
Exhibit A	126
Exhibit B	131

INDEX (Continued)

	Page
Exhibit C	134
Exhibit D	136
Memorandum in Support of Motion for Injunction:	
Statement of Facts	144
Exhibit 1	158
Exhibit 2	160
Exhibit 3	163
Exhibit 4	165
Exhibit 5	167
Exhibit 6	168
Exhibit 7	170
Exhibit 8	171
Exhibit 9	172
Exhibit 10	174
Exhibit 11	177
Exhibit 12	179
Exhibit 13	180
Exhibit 14	182
Exhibit 15	184
Exhibit 16	189
Exhibit 17	191
Motion to Stay	205
Exhibit B	206
Exhibit C	215
Order	224

INDEX—Continued

	Page
OPINION UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT	229
ORDER GRANTING REHEARING ENBANC	282
FIFTH CIRCUIT OPINION ON REHEARING ENBANC	283
JUDGMENT ON REHEARNG ENBANC	293
UNTERWESER AND BREMEN SUPPLEMNTAL DOCUMENTS ON REHEARING	295
(a) Telex's revoyage and insurance	295
(b) Telex bid from Wijsmuller	296
(c) Letter bid from Hansen and Tidemann, Inc. to Zapata	297
(d) Daywork Drilling contract	299
ZAPATA'S SUPPLEMENTAL DOCUMENTS ON REHEARING:	320
(a) affidavit of E. S. Shiels	320
(b) affidavit of Fergus Dingwall Bateson	324
Exhibit 1	330
Exhibit 2	335

APPENDIX

Supreme Court of the United States

TERM, 1971

No. 71-322

M/S BREMEN AND
UNTERWESER REEDEREI, GMBH,
Petitioner,
vs.
ZAPATA OFFSHORE COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 1, 1971
CERTIORARI GRANTED NOVEMBER 9, 1971

UNITED STATES DISTRICT COURT,
MIDDLE DISTRICT OF FLORIDA

DOCKET ENTRIES
NO. 68-21-CIVIL-T.

1968

Jan. 12 Complaint filed.
Jan. 12 Pltf's Stipulation for Costs.
Jan. 12 Notice of Taking Depositions of Marine Superintendent, et al, (Subp's. delv'd. to Marshal by Counsel)
Jan. 16 Photostatic copy of U.S. Marshals Public Notice of Attachment, on Jan. 12, 1968.
Jan. 17 Defts. Motion for Protective Order.
Jan. 17 Notice of taking depositions returned executed re M/S BREMEN, Jan. 12, 1968.
Jan. 22 Pltf's. notice of taking deposition of Managing Director Aswegen, Jan. 29, 1968, 9:30 A.M.
Jan. 26 Consent to release from attachment.
Jan. 26 Writ of restitution in cause pending issued

and delivered to Marshal.

Jan. 29 Claim of Owner, Unterwester Reederei GMBH.

Jan. 29 Stipulation for costs.

Jan. 29 Motion to dismiss on ground of lack of jurisdiction or, alternatively, for entry of order declining jurisdiction and/or staying further prosecution; affidavit of Erich Von Aswegen.

Jan. 29 Motion for protective order and order quashing subpoenae.

Jan. 29 Memo brief in support of motions.

Jan. 29 Motion by Zapata-OffShore Company to compel defendant to Proceed with Depositions.

Jan. 29 Preliminary memo of pltf. in opposition to dft's. motion to dismiss for lack of jurisdiction, and motion to decline jurisdiction, or to stay proceedings.

Jan. 30 Writ returned executed re M/S BREMEN, Jan. 12, 1968 and UNTERWESER REEDEREI GMBH, January 12, 1968.

Feb. 1 Writ of restitution returned executed; M/S Breman released, Jan. 26, 1968.

Feb. 15 Transcript of hearing on defendant's motion for protective order and order quashing subpoena; and on plaintiff's motion to compel defendant to proceed with depositions.

Feb. 16 Dft's. notice of taking depositions of Oscar D. Willard, Feb. 22, 1968, 9:30 A.M., and following on Feb. 23, 1968: Wilton Johnson, 9:30 A.M.; Oscar W. Paul, 1:30 P.M.; Nolan R. Gamble, 2:30 P.M.; Samule K. Price, 3:30 P.M.; Billy C. Burke, 4:30 P.M.; Earl Richie, 5:30 P.M.; L. J. Fruge, 7:30 P.M.

Feb. 20 Pltf's. notice of taking depositions upon oral examination March 13, 1968 of the following: Noel Thompson, 9:00 A.M.; John Hellendoorn, 11:00 A.M.; James Booth, 1:00 P.M. and Hoyt Taylor, 3:00 P.M.

Feb. 27 Dft's. motion for production of documents.

Feb. 27 Memo.

Feb. 28 Notice of taking depositions upon oral examinations of Radio Officer Hartmut Siebert, et al. Jan. 16 and 17, 1968.

NO. 68-21-CIVIL-T.

Mar. 1 Notice of Hearing on Motions set Apr. 9, 1968 at 1:30 P.M.

Mar. 6 Order denying motion of pltf. re Rule 30, etc.; Allowing either party one expert to assist at deposition, etc. (Copies to attys.)

Mar. 8 Notice changing the Hearing on Motions to April 29, 1968 at 9:30 A.M.

Mar. 8 Memo in opposition to motion for production of documents of Unterwester Reederei.

Mar. 15 Amended notice of taking depositions April 9, 1968 of Noel Thompson, 9:00 A.M.; John Hellendoorn, 11:00 A.M. & Kenneth Price, 1:00 P.M.

Mar. 15 Dft's. notice of taking depositions of Noel Thompson, 9:00 A.M. & John Hellendoorn, 11:00 A.M. on April 9, 1968.

Apr. 22 Amended Memo of Pltf. in opposition to Defts. Motion to Dismiss, etc.

Apr. 22 Memorandum brief of Deft. Unterweser Reederei GMBH.

Apr. 22 Affidavit of Carl Apthorp, Sec. of Zapata Off-Shore Co.

Apr. 22 Affidavit of Hoyt Taylor, V. P. of Zapata

Apr. 22 Affidavit of Fergus Dingwall Bateson

Apr. 24 Dft's. notice of reliance upon foreign law.

May 3 Depositions of Johannes W. H. Hellendoorn, Alfred Noel Thompson & Kenneth Price.

July 2 Supplemental memo of pltf. in opposition to dft's. motion to dismiss, etc.

July 8 Reply Memorandum of dft., Unterweser Reederei to pltf.

July 29 Memo and Order denying Dft's. Motion to Dismiss for Lack of Jurisdiction, Requesting the Court to Decline Jurisdiction on Grounds of Forum Non Conveniens. (Copies to attys.)

Aug. 8 Dft's. motion to certify question pursuant to 28 U.S.C.A. #1292 (b).

Aug. 8 Memo of law.

Aug. 27 Memo of pltf. in opposition to dft's. motion to certify question pursuant to 28 U.S.C.A., #1292(b)

& memo of law in support, attached exhibits.

Sept. 17 Notice of Hearing on Motions set Dec. 19, 1968 at 9:30 A.M.

Dec. 19 Cert. copy of objection to claim & counterclaim in Case No. 68-290-Civ. T.

Dec. 19 Cert. copy of reply to counterclaim in Case No. 68-290-Civ. T.

Dec. 26 Notice of filing exhibits by pltf.

1969

Jan. 16 Order that Motion of Deft. to certify question pursuant to 28 U.S.C.A. 1292(b) is Denied (furnished copies mailed attys.)

Feb. 28 Joint motion to direct the clerk to transmit the record in Case No. 68-21-Civ. T. along with record on appeal in this cause. (Original in 68-290-Civ. T.)

Feb. 28 Order directing Clerk of Court to prepare records for Zapata, etc. (68-290-Civ. T.) & Unterweser, etc. (68-21-Civ. T.) for transmittal to USCA. (Copies to attys.) (Original filed in 68-290-Civ. T.)

Mar. 6 Stay order pending final disposition of appeal taken by pltf. to USCA from order of Dist. Court entered Jan. 21, 1969 (Copies to attys.) (Original filed in 68-290 Civ.T.)

UNITED STATES DISTRICT COURT, MIDDLE DISTRICT OF FLORIDA

DOCKET ENTRIES

NO. 68-290-CIV. T.

1968

July 2 Complaint filed.

July 2 Stipulation for Costs $250.00 (U.S. Fidelity & Guaranty Co.)

July 2 Notice of Reliance Upon Foreign Law.

July 2 Ad Interim Stipulation ($1,390,000.00) National Surety Corporation.

July 5 Order for Monition and Restraining Order (furnished copies mailed attys.)

July 8 Notice of Complaint delvd. to U. S. Marshal.

July 8 Monition and copies delvd. to U. S. Marshal.

July 8 Claim of Zapata Off-Shore Co. as owner of the CHAPARRAL.

July 8 Claimants Stipulation for Costs $500.00 (Fidelity and Casualty Co. of New York).

July 24 Answer of Zapata Off-Shore Company.

Aug. 28 Objection of Unterweser Reederei, GMBH, to claim and counterclaim filed by Zapata Off-Shore Co.

Sept. 13 Zapata Off-Shore Company Reply to Counterclaim of Unterweser Reederei GMBH.

Sept. 19 Motion of Zapata Off-Shore Co. for injunction.

Sept. 19 Memo in support.

Oct. 2 Preliminary memo of law in opposition to motion for injunction.

Oct. 2 Pltf's. motion to stay further prosecution of captioned proceeding.

Oct. 2 Memo of law in support.

Oct. 2 Monition returned executed, 9-28-68.

Oct. 3 Notice of Hearing on Motions set Nov. 27, 1968 at 1:30 P.M.

Oct. 9 Stipulation between counsel for order extending time to file reply memo.

Oct. 11 Order granting Zapata Off-Shore Co. to & inc. Nov. 15, 1968 to file re Motion to Stay, etc. (Copies to attys.)

Oct. 23 Pltf.'s information to claimants.

Nov. 13 Memo of Zapata Offshore Co. in opposition to pltf's. motion to stay.

NO. 68-290-CIV. T.

1969

Jan. 21 Order granting motion for injunction filed by Zapata Off-Shore Co.; denying motion for stay of Unterweser Reederei; & enjoining parties from proceeding further pending Court's determination in case. (Copies to attys.)

Jan. 22 Pltf's. motion for stay pending appeal & memo in; support.

Jan. 24 Notice of Hearing on motions set Feb. 20, 1969 at 3:30 P.M.

Feb. 4 Notice of Appeal by Pltf. Unterweser Reederei, GMBH (copies mailed as per Instructions to Clerk attached to Notice).

Feb. 4 Appeal Bond $250.00 (U. S. Fidelity & Guaranty Co.)

Feb. 28 Joint motion to direct the clerk to transmit the record in Case No. 68-21 Civil-T along with the record on appeal in this cause.

Feb. 28 Order directing Clerk of Court to prepare records for Zapata, etc. (68-290-Civ.T.) and Unterweser, etc. (68-21-Civ.T.) for transmittal to USCA. (Copies to counsel)

Mar. 6 Stay Order pending final disposition of appeal taken by pltf. to USCA from order of Dist. Court entered Jan. 21, 1969. (Copies to attys.)

Filed, Tampa, Fla., Jan. 12, 1968 No. 68-21 Civ-T

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ZAPATA OFF-SHORE COMPANY,
Plaintiff,

vs.

M/S BREMEN and UNTERWESER REEDEREI GMBH,
Defendant.

COMPLAINT

The Complaint of Zapata Off-Shore Company against the M/S BREMEN, its engines, tackle, etc., and all persons intervening for their interest therein, and against Unterweser Reederei GMBH, in a cause of breach of contract and tort, a maritime claim within the meaning of Rule 9 (h), Federal Rules of Civil Procedure, as follows:

I.

At all material times herein, plaintiff was and is now a corporation organized under the laws of the State of Delaware, with its principal office in Houston, Texas, and was and now is owner of the Drilling Rig CHAPARRAL, which, at the time of the casualty herein described, was in all respects seaworthy.

II.

At all material times herein, the defendant, Unterweser Reederei GMBH, hereafter "Unterweser", was a company or corporation or a legal entity organized and existing under the laws of West Germany, with its principal office in Bremen, Germany. Said defendant was and is now the owner and operator of the ocean-going tug M/S BREMEN.

III.

On November 3, 1967, plaintiff entered into a written contract with defendant Unterweser under which said defendant agreed to tow the Drilling Rig CHAPARRAL from Venice, Louisiana, to a point near Ravenna, Italy.

Defendant impliedly warranted that it would perform said towage contract in a proper, efficient, and workmanlike manner.

Pursuant to said contract, defendant's tug M/S BREMEN took the CHAPARRAL under tow on January 4, 1968, at a point just below Venice, Louisiana, and thereafter proceeded into the Gulf of Mexico, heading for the Florida Straits. At all material times, defendant's agents, servants and employees were in complete command and control of the M/S BREMEN and the CHAPARRAL and were wholly responsible for the safety of the CHAPARRAL on the aforesaid voyage.

On January 9, 1968, while navigating in the Gulf of Mexico, the M/S BREMEN and the CHAPARRAL encountered rough weather (which should have reasonably been anticipated by those in charge of said tug) as a result of which the CHAPARRAL sustained severe damages to its three legs, elevating mechanisms, and other parts of said drilling rig. Thereafter, the M/S BREMEN commenced towing the CHAPARRAL to the Port of Tampa, Florida.

The M/S BREMEN is now or will be during the pendency of process herein within the territorial jurisdiction of this Court.

IV.

The plaintiff and its agents, servants and employees did not cause, or contribute to cause, the aforesaid casualty and damages resulting therefrom, but on the contrary, the same were caused by the unseaworthiness of the M/S BREMEN, or the breach of defendant's implied warranty to perform the towage service in a proper, efficient and workmanlike manner, or the fault and negligence of the defendant and its agents, servants and employees, and those in charge of the M/S BRE-

MEN, among others, or a combination of one or more of the foregoing, which will be shown at the trial of this cause to-wit:

(1) The M/S BREMEN was in charge of incompetent personnel who failed to tow the CHAPARRAL in a safe and proper manner.

(2) Those in charge of the M/S BREMEN failed to reasonably anticipate the weather conditions to be encountered on said voyage.

(3) When danger to the CHAPARRAL was, or should have been, apparent to those in charge of the BREMEN, those in charge of the BREMEN failed to take steps to avert the danger and prevent the damages.

(4) Those in charge of the BREMEN were careless and inattentive to their duties.

(5) The BREMEN was unseaworthy in respects which contributed to the damages above mentioned.

V.

As a result of the aforesaid casualty, plaintiff has sustained, or will sustain, losses for physical damages to the drilling rig CHAPARRAL and loss of use thereof in the amount of $3,500,000.00 as nearly as can be presently estimated, and alleges that it has a maritime lien on the tug BREMEN therefor. Plaintiff reserves the right to amend its complaint and increase the amount of the damages should the same be necessary.

The premises of this complaint are true and correct and within the admiralty and maritime jurisdiction of the United States and this Court.

WHEREFORE, plaintiff prays

1. That process in due form of law according to the rules and practice of this Honorable Court in causes of admiralty and maritime jurisdiction may issue against the German Motor Vessel BREMEN, her engines, tackle, apparel, etc. citing all persons claiming any interest

therein to appear and answer on oath all and singular the matters aforesaid, and

2. That process in due form of law, according to the rules and practice of this Honorable Court, in causes of admiralty and maritime jurisdiction, may issue against the defendant Unterweser Reederei GMBH, citing it to appear and answer on oath all and singular the matters aforesaid, and

3. Providing that said defendant Unterweser Reederei GMBH cannot be found within this district, that all goods and chattels belonging to it within this district may be attached by process of foreign attachment to the amount of $2,000,000, the sum sued for in the complaint, together with interest, costs and the disbursments of the plaintiff; and

4. That this Honorable Court will order, adjudge and decree that the said defendants, and each of them are liable to the plaintiff, and that the said defendants, and each of them, pay to the plaintiff the damages sustained by the plaintiff together with interest thereupon and the plaintiff's costs and disbursements herein, and

5. That the said Motor Vessel BREMEN may be condemned and sold to pay the demands aforesaid, with interest and costs, and that the plaintiff shall have such other and further relief in the premises as in law and justice it may be entitled to receive.

ZAPATA OFF-SHORE COMPANY, Plaintiff
By BAKER, BOTTS, SHEPHERD & COATES
1600 Esperson Building
Houston, Texas 77002
By: *James K. Nance*
James K. Nance
-and-
FOWLER, WHITE, COLLINS, GILLEN, HUMKEY & TRENAM
P. O. Box 1438, Tampa, Florida
By: *Dewey R. Villareal, Jr.*
Its Attorneys

Filed, Tampa, Fla., Jan. 12, 1968 No. 68-21 Civ-T

NOTICE OF TAKING DEPOSITIONS UPON ORAL EXAMINATIONS

TO: Unterweser Reederei GMBH
and/or its attorneys
M/S Bremen
and/or its attorneys
Master of M/S Bremen
and/or his attorney

PLEASE TAKE NOTICE that the Plaintiff, ZAPATA OFF-SHORE COMPANY, will take the deposition upon oral examination of the below listed parties and/or witnesses, on the dates and at the times shown with respect to each such party and/or witness, before Richard H. Lee, Jr., a Notary Public, or some other officer authorized by law to take depositions, at the offices of Lee & Nicodemus, 922 First Federal Building, 220 Madison Street, Tampa, Florida. The said depositions will be taken under and used in accordance with Sections 863, 864, and 865 of the Revised Statutes of the United States. The oral examinations will continue from day to day until completed. You are invited to attend and cross examine.

1. MARINE SUPERINTENDENT of Unterweser Reederei GMBH who was on board the Drilling Rig CHAPARRAL, enroute Venice, Louisiana to Tampa, Monday, January 15, 1968, at 2:00 o'clock p.m.
2. MASTER OF M/S BREMEN, Monday, January 15, 1968, at 3:00 o'clock p.m.
3. CHIEF OFFICER, M/S BREMEN, Tuesday, January 16, 1968 at 9:00 o'clock a.m.
4. SECOND OFFICER, M/S BREMEN, Tuesday, January 16, 1968, at 9:30 o'clock a.m.
5. THIRD OFFICER, M/S BREMEN, Tuesday, January 16, 1968, at 10:00 o'clock a.m.
6. CHIEF ENGINEER, M/S BREMEN, Tuesday, January 16, 1968, at 10:30 o'clock a.m.
7. SECOND ENGINEER, M/S BREMEN, Tuesday, January 16, 1968, at 11:00 o'clock a.m.

8. THIRD ENGINEER, M/S BREMEN, Tuesday, January 16, 1968 at 11:30 o'clock a.m.

9. BOATSWAIN, M/S BREMEN, Tuesday, January 16, 1968, at 1:00 o'clock p.m.

10. CARPENTER, M/S BREMEN, Tuesday, January 16, 1968, at 1:30 o'clock p.m.

11. NUMBER ONE ABLE SEAMAN, M/S BREMEN, Tuesday, January 16, 1968, at 2:00 o'clock p.m.

12. NUMBER TWO ABLE SEAMAN, M/S BREMEN, Tuesday, January 16, 1968, at 2:30 o'clock p.m.

13. NUMBER THREE ABLE SEAMAN, M/S BREMEN, Tuesday, January 16, 1968, at 3:00 o'clock p.m.

14. NUMBER ONE ORDINARY SEAMAN, M/S BREMEN, Tuesday, January 16, 1968, at 3:30 o'clock p.m.

15. NUMBER TWO ORDINARY SEAMAN, M/S BREMEN, Tuesday, January 16, 1968, at 4:00 o'clock p.m.

16. NUMBER THREE ORDINARY SEAMAN, M/S BREMEN, Tuesday, January 16, 1968, at 4:30 o'clock p.m.

17. NUMBER ONE MOTOR MAN OR OILER, M/S BREMEN, Tuesday January 16, 1968, at 5:00 o'clock p.m.

18. NUMBER TWO MOTOR MAN OR OILER, M/S BREMEN, Wednesday, January 17, 1968, at 9:00 o'clock a.m.

19. NUMBER THREE MOTOR MAN OR OILER, M/S BREMEN, Wednesday, January 17, 1968, at 9:30 o'clock a.m.

20. COOK, M/S BREMEN, Wednesday, January 17, 1968, at 10:00 o'clock a.m.

21. GALLEY MAN, M/S BREMEN, Wednesday, January 17, 1968, at 10:30 o'clock a.m.

22. NUMBER ONE SEAMAN RIDING ON DRILL RIG CHAPARRAL WITH MARINE SUPERINTENDENT, Wednesday, January 17, 1968, at 11:00 o'clock a.m.

23. NUMBER TWO SEAMAN RIDING ON DRILL RIG CHAPARRAL WITH MARINE SUPERINTENDENT, Wednesday, January 17, 1968, at 11:30 o'clock a.m.

BAKER, BOTTS, SHEPHERD & COATES
1600 Esperson Building
Houston, Texas 77002
By: *James K. Nance*
James K. Nance
-and-
FOWLER, WHITE, COLLINS, GILLEN, HUMKEY & TRENAM
P. O. Box 1438, Tampa, Florida
By: *Dewey R. Villareal, Jr.*
ATTORNEYS FOR PLAINTIFF

Filed, Tampa, Fla., Feb. 28, 1968 No. 68-21 Civ. T.

NOTICE OF TAKING DEPOSITIONS

UPON ORAL EXAMINATIONS

TO: Unterweser Reederei GMBH
and/or its attorneys
M/S BREMEN
and/or its attorneys
Master of M/S BREMEN
and/or his attorney
David C. G. Kerr, Esquire
MACFARLANE, FERGUSON, ALLISON & KELLY
Hillsboro Hotel Building
Tampa, Florida

PLEASE TAKE NOTICE that the Plaintiff, ZAPATA OFF-SHORE COMPANY, will take the deposition upon oral examination of the below listed parties and/or witnesses, on the dates and at the times shown with respect to each such party and/or witness, before Richard H. Lee, Jr., a Notary Public, or some other officer authorized by law to take depositions, at the offices of Lee & Nicodemus, 922 First Federal Building, 220 Madison Street, Tampa, Florida. The said depositions will be taken under and used in accordance with Sections 863, 864, and 865 of the Revised Statutes of

the United States. The oral examinations will continue from day to day until completed. You are invited to attend and cross examine.

1. RADIO OFFICER HARTMUT SIEBERT, Tuesday, January 16, 1968, at 3:30 o'clock p.m.
2. ELECTRICIAN HORST SIECH, Tuesday, January 16, 1968, at 4:00 o'clock p.m.
3. ABLE SEAMAN WOLF SCHONEFELD, Tuesday, January 16, 1968, at 4:30 o'clock p.m.
4. SECOND ENGINEER FRIEDRICH NIEMEIER, Wednesday, January 17, 1968, at 1:00 o'clock p.m.
5. MOTORMAN HANS MOHRING, Wednesday, January 17, 1968, at 1:30 o'clock p.m.

The following employees of ZAPATA OFF-SHORE COMPANY who were riding on the drilling rig:

6. OSCAR D. WILLARD, Wednesday, January 17, 1968, at 7:00 o'clock p.m.
7. WILTON JOHNSON, Wednesday, January 17, 1968, at 2:30 o'clock p.m.
8. OSCAR W. PAUL, Wednesday, January 17, 1968, at 3:00 o'clock p.m.
9. NOLAN R. GAMBLE, Wednesday, January 17, 1968, at 3:30 o'clock p.m.
10. SAMUEL K. PRICE, Wednesday, January 17, 1968, at 4:00 o'clock p.m.
11. BILLY C. BURKE, Wednesday, January 17, 1968, at 4:30 o'clock p.m.
12. EARL B. RICHEE, Wednesday, January 17, 1968, at 5:00 o'clock p.m.
13. L. J. FRUGE, Wednesday, January 17, 1968, at 5:30 o'clock p.m.

BAKER, BOTTS, SHEPHERD & COATES
1600 Esperson Building
Houston, Texas 77002
By: *James K. Nance*
James K. Nance
FOWLER, WHITE, COLLINS, GILLEN, HUMKEY & TRENAM
P. O. Box 1438, Tampa, Florida
By: *Dewey R. Villareal, Jr.*
Dewey R. Villareal, Jr.
ATTORNEYS FOR PLAINTIFF

Filed, Tampa, Fla., Jan. 17, 1968 No. 68-21-Civ-T

MOTION FOR PROTECTIVE ORDER

COME NOW Attorneys for Defendants, M/S BREMEN and UNTERWESER REEDEREI GMBH, and respectfully move the Court for a protective order postponing taking of depositions, and as grounds therefor show unto the Court as follows:

1. On or about January 11, 1968, Plaintiff, Zapata Off-Shore Company, by and through its attorneys, filed its complaint against Defendants M/S BREMEN and Unterweser Reederei GMBH, alleging a maritime claim arising out of an incident occurring in the Gulf of Mexico on or about January 9, 1968, while the Drilling Rig CHAPARRAL, owned by Plaintiff, was under tow by the M/S BREMEN.

2. On or about January 13, 1968, Plaintiff noticed depositions of some thirteen persons believed to be crew members aboard both the M/S BREMEN and the Drilling Rig CHAPARRAL, said notice being filed pursuant to Sections 863, 864 and 865 of the Revised Statutes of the United States (28 U.S.C.A., §§639, 640 and 641).

3. At approximately 10:00 a.m. Saturday, January 13, 1968, the undersigned was directed to act as counsel on behalf of Defendants, and was authorized to obtain surveyor representatives to attend survey on board the Drilling Rig CHAPARRAL scheduled by Plaintiff for Sunday, January 14, 1968, at 11:00 a.m. The undersigned also was advised by New York representatives of Defendants that two officers of Defendant corporation were enroute to the United States, and desired that any further steps in the proceeding be deferred until arrival of such officers in Tampa. Accordingly, undersigned attorney for Defendants undertook to make arrangements for representative surveyors to attend survey of the Drilling Rig CHAPPARRAL scheduled for the following day, and also advised counsel for Plaintiff that taking of depositions could not proceed until arrival of corporate officers from Germany.

4. Representatives of Defendant owners of the Tug M/S BREMEN did not arrive in Tampa until late Monday afternoon, January 15th, a journey of thirty-six uninterrupted hours of travel. Consequently, undersigned had no opportunity to consult with German representatives until Tuesday, January 16th, and since said date has been engaged on a continuous basis in making necessary arrangements and obtaining appropriate authorities with German and London interests, as well as arranging for inspection of the Drilling Rig CHAPARRAL presently lying at anchor off of Egmont Key. Due to the necessity of handling preliminary matters, as well as the language barrier, neither the undersigned nor representatives from Defendant corporation have had an opportunity to complete preliminary investigation into the facts and circumstances surrounding the claim alleged in the complaint by Plaintiff, and accordingly are not in a position to commence formal discovery proceedings without being severely prejudiced through lack of preliminary inquiry and investigation.

WHEREFORE, in consideration of the premises, Defendants pray that the Court enter its protective order postponing the taking of these depositions in order to provide Defendants with a reasonable period of notice in view of the facts and circumstances above stated.

David C. G. Kerr

David C. G. Kerr, Of
MACFARLANE, FERGUSON, ALLISON & KELLY
P. O. Box 1531 - Tampa, Florida 33601
ATTORNEYS FOR DEFENDANTS.

Lamorte, Burns & Co., Inc.
26 BROADWAY
NEW YORK, N. Y. 10004

CORRESPONDENTS FOR:
THE BRITANNIA STEAM SHIP INSURANCE ASS'N. LTD.
THE LONDON STEAM-SHIP OWNERS' MUTUAL INSURANCE ASS'N. LTD.
THE NEPTUNE PROTECTING AND INDEMNITY ASS'N. LTD.
NEWCASTLE PROTECTION AND INDEMNITY ASS'N.
THE NORTH OF ENGLAND PROTECTING AND INDEMNITY ASS'N. LTD.
THE SHIPOWNERS' MUTUAL STRIKE INSURANCE ASS'N. LTD.
THE STANDARD STEAMSHIP OWNERS' P. & I. ASS'N. LTD.
THE STEAMSHIP MUTUAL UNDERWRITING ASS'N. LTD.
THE SUNDERLAND STEAMSHIP P. & I. ASS'N.
UNITED KINGDOM MUTUAL STEAM SHIP ASSURANCE ASS'N. LTD.

TELEX
WUI-620332
ITT-421 [illegible]

TELEPHONE
WHITEHALL 4-7562

CABLE ADDRESS:
LABURNSHIP

YOUR REF.

January 24, 1968 OUR REF. ACB/SG

Zapata Off-Shore Company
Bank of the Southwest Tower
Houston, Texas

RE: Zapata Off-Shore Company v.,
The M/S BREMEN et al
United States District Court
Middle District of Florida
Tampa Division
Civil Action #68-21 CIV. T.

Gentlemen:

In consideration of your releasing from seizure the M/S BREMEN in the above captioned cause now pending in the United States District Court for the Middle District of Florida, Tampa Division, at all times material in this suit owned and operated by Unterweser Reederei G.m.b.H. and not arresting any other vessel of the same ownership, or attaching any property or funds belonging to the said owners of the M/S BREMEN, in connection with the claim of Zapata Off-Shore Company for its damages as alleged in the above described lawsuit, the undersigned, as Underwriter for the M/S BREMEN and her said owners at the time of this casualty, hereby agree with you as follows:

1. To file, or cause to be filed, upon your demand, an appearance on behalf of the said owners of the M/S BREMEN in the suit filed in the United States District Court of the Middle District of Florida, Tampa Division, in connection with the above matter, and to file, or cause to be filed, a claim of owners to the M/S BREMEN in such action, subject to the rights of said owners of the M/S BREMEN to asserting of any right or defenses it may have, including but not limited to challenging jurisdiction of any court and petitioning for limitation of liability.

2. In the event a final decree in such action (after all appeals, if any) be entered in your favor against the M/S BREMEN and/or her owners, the undersigned Underwriter agrees to pay and satisfy said

final decree, or any lesser amount decreed by the court through limitation or otherwise, or the amount of any settlement agreed upon between the parties without final decree being rendered, provided always that the liability of the Underwriter hereunder shall not exceed $3,500,000.00, including interest and costs.

3. Upon demand, to cause to be filed in such action a bond in the form and sufficiency of surety satisfactory to you or to the court, in an amount not to exceed $3,500,000.00, the exact amount to be fixed by agreement of the parties, or in the absence of agreement by the parties, by the court. In the event any such bond is required, and is filed the undersigned shall have no further obligation under this letter.

4. If you commence any action in any court of the competent jurisdiction in the United States in connection with this letter of undertaking, the undersigned agrees to file, or cause to be filed upon your demand, an appearance and answer in said action.

If you commence any action in connection with this letter of undertaking the undersigned irrevocably appoints the Secretary of State of the State in which the action is commenced, or his successor, as agent for the undersigned upon whom process may be served and be binding upon the undersigned.

This letter is written entirely without prejudice to the rights or defenses which the said M/S BREMEN or its said owners may have, including but not limited to, challenging jurisdiction of any court and petitioning for limitation of liability.

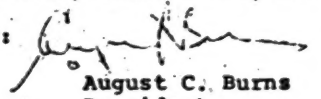
It is understood and agreed that the signing of this letter on our behalf by Lamorte, Burns & Co., Inc. as our Attorney-in-Fact does not bind Lamorte, Burns & Co., Inc. personally, but does bind the United Kingdom Mutual Steam Ship Assurance Association Limited.

Lamorte, Burns & Co., Inc. expressly represents that it has been authorized by the United Kingdom Mutual SteamShip Assurance Association Limited to sign this letter on behalf of the undersigned as its Attorney-in-Fact for this limited purpose only.

Very truly yours,

UNITED KINGDOM MUTUAL STEAM SHIP ASSURANCE ASSOCIATION LIMITED

LAMORTE, BURNS & CO., INC.

By: 

August C. Burns
President

(As Attorney-in-Fact for the above limited purpose only, as per cable authority received from the United Kingdom Mutual Steam Ship Assurance Association Limited under date of January 24, 1968.)

Filed, Tampa, Fla., Jan. 29, 1968 No. 68-21 Civ. T.

CLAIM OF OWNER

NOW COMES, UNTERWESER REEDEREI GMBH, a foreign corporation, and says that it is the true and bona fide owner of the M/S BREMEN, her engines, tackle, apparel, equipment, etc., as the same are proceeded against in the above entitled cause, and that no other person or corporation is the owner thereof.

WHEREFORE, Claimant prays that it may be permitted to defend accordingly, reserving, however, the right to challenge the jurisdiction of this Court by appropriate Motion or Motions.

UNTERWESER REEDEREI GMBH

By: *Erich Von Aswegen*
ERICH VON ASWEGEN
Managing Director

MACFARLANE, FERGUSON, ALLISON and KELLY

By: *David C. G. Kerr*
DAVID C. G. KERR
Post Office Box 1531
Tampa, Florida 33601
Attorneys for Claimant - Defendant

Filed, Tampa, Fla., Jan. 29, 1968 No. 68-21 Civ. T.

MOTION TO DISMISS ON THE GROUND OF LACK OF JURISDICTION OR, ALTERNATIVELY, FOR ENTRY OF AN ORDER DECLINING JURISDICTION AND/OR STAYING THE FURTHER PROSECUTION OF THESE PROCEEDINGS.

COMES NOW the Claimant-Defendant, UNTERWESER REEDEREI GMBH, a corporation, by its attorneys undersigned, and shows unto the Court as follows:

1. That, as averred in Paragraph III of Plaintiff's Complaint, Plaintiff entered into a written towage contract with Claimant-Defendant under date of November 3, 1967, whereby Defendant agreed to tow the Drilling Barge CHAPARRAL from Venice Louisiana to a point

near Ravenna, Italy; further, that the casualty out of which the within litigation arose occurred during the course of performance of said towage contract.

2. That, as set forth in the affidavit of ERICH VON ASWEGEN, one of the Managing Directors of UNTER-WESER REEDEREI GMBH, Defendant herein and Claimant and owner of the M/S BREMEN, which said affidavit is annexed hereto as Claimant-Defendant's Exhibit "A", the parties to said towage contract stipulated and agreed that "Any dispute arising must be treated before the London Court of Justice"; that, accordingly, this Court has no jurisdiction over the subject matter of this claim.

3. That in the alternative, in light of the matters set forth in the affidavit of ENRICH VON ASWEGEN, annexed hereto as Exhibit "A", the Court should decline to assume jurisdiction over the within cause on the ground of *forum non conveniens*.

4. That, in the alternative, this Court should enter an Order staying the further prosecution of these proceedings pending the submission of the dispute sought to be raised by Plaintiff to the London Court of Justice, all in accordance with the towage contract, copy of which is attached to and indentified by Exhibit "A" to this Motion.

WHEREFORE, Claimant-Defendant moves this Honorable Court to enter an Order:

(a) Dismissing Plaintiff's Complaint on the ground of lack of jurisdiction; or

(b) Declining jurisdiction over the cause of action asserted in Plaintiff's Complaint on the ground of *forum non conveniens;* and/or

(c) Staying the further prosecution of these proceedings pending the submission of the dispute set out in Plaintiff's Complaint to the London Court of Justice.

MACFARLANE, FERGUSON, ALLISON and KELLY

By: *David C. G. Kerr*
DAVID C. G. KERR
Post Office Box 1531
Tampa, Florida 33601
Attorneys for Claimant - Defendant

IN THE UNITED STATES DISTRICT COURT, IN AND FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ZAPATA OFF-SHORE COMPANY,)
Plaintiff,)
vs.)
M/S BREMEN and UNTERWESER REEDEREI GMBH,) No. 68-21 Civ. T.
Defendants.)

AFFIDAVIT

STATE OF FLORIDA }
COUNTY OF HILLSBOROUGH } ss.

BEFORE ME, the undersigned authority, personally appeared ERICH VON ASWEGEN, who, being by me first duly sworn, deposes and says:

1. That he is one of the Managing Directors of UNTERWESER REEDEREI GMBH, a corporation organized and existing under the Laws of West Germany, which said corporation is the Claimant-Defendant in the above entitled and numbered cause.

2. That Affiant, in his capacity as one of the Managing Directors of UNTERWESER REEDEREI GMBH, has personal knowledge respecting that certain towage contract entered into by and between ZAPATA OFF-SHORE COMPANY and UNTERWESER REEDEREI GMBH, at Bremen, Germany, under date of November 3, 1967, and respecting the negotiations leading up to the execution of that contract.

3. That there is annexed hereto as Affiant's Exhibit No. 1 a photostatic copy of the towage contract aforementioned, which said contract Affiant has examined and knows of his own personal knowledge to be a true and correct copy of that certain towage contract dated Bremen, November 3, 1967, by and between ZAPATA OFF-SHORE COMPANY and UNTERWESER REEDEREI GMBH.

4. That the provision contained in said contract, identified as Paragraph No. 8 under "General Towage Conditions," which reads as follows:

> "8. Any dispute arising must be treated before the London Court of Justice,"

was considered by UNTERWESER REEDEREI GMBH to be of overriding importance. As set forth in the towage contract (clause 15 thereof), the General Towage Conditions, including specifically clause 8 thereof hereinbefore quoted, were to be considered an "integral part" of the towage contract. Ordinarily, UNTERWESER REEDEREI GMBH towage contracts provide for exclusive German jurisdiction and for the application of German law. In this instance, in an effort to meet ZAPATA OFF-SHORE COMPANY half way, UNTERWESER REEDEREI GMBH proposed the London Court of Justice. Had this provision not been accepted by ZAPATA OFF-SHORE COMPANY, UNTERWESER REEDEREI GMBH would not have entered into the towage contract, said provision being considered fundamental to the agreement.

5. That on the basis of his personal knowledge, Affiant states:

(a) That the casualty involving the M/S BREMEN and the barge CHAPARRAL out of which the within proceedings have arisen occurred in International Waters.

(b) That the M/S BREMEN was constructed in West Germany in the year 1967; that she is licensed and documented under the Laws of West Germany, having her home port at Bremen, Germany; and that the officers and crew of the M/S BREMEN are, without exception, of German nationality.

(c) That UNTERWESER REEDEREI GMBH is the owner of the M/S BREMEN; that said corporation is a corporation organized and existing under the Laws of West Germany, and that a controlling interest therein is owned by another German corporation.

(d) That final acceptance of the contract entered into by and between ZAPATA OFF-SHORE COMPANY and UNTERWESER REEDEREI GMBH, dated Bremen, November 3, 1967, occurred at Bremen, Germany and that the performance thereof, in large part, was to have taken place in International Waters; that final performance thereof was to have occurred in the vicinity of Ravenna, Italy, and that final payment thereunder was not to have been made until delivery of the tow at or near Ravenna, Italy.

(e) That the arrest of the M/S BREMEN at Tampa, Florida, was possible only by reason of the happenstance

of Tampa being the closest port of refuge subsequent to the occurrence of the casualty in International Waters; that Tampa, Florida, and the United States District Court for the Middle District of Florida constitutes an inaccessible and inconvenient forum insofar as UNTERWESER REEDEREI GMBH is concerned; that the location of the foreign forum selected by the parties under and pursuant to the aforementioned towage contract, copy of which is attached hereto as Affiant's Exhibit No. 1, namely, London, England, constitutes the "balance of convenience" insofar as the relative positions of the parties hereto are concerned.

(f) That in agreeing upon the designation of the London Court of Justice as the forum to which any dispute arising under the aforesaid towage contract would be submitted, the parties intended that the controlling law to be applied would be the law of the forum, i.e., English law.

6. That Affiant has agreed through his counsel of record, and hereby reiterates his agreement, to make himself available in the United States, and, at the request of counsel for the Plaintiff, at Tampa, Florida, to give his Deposition on the jurisdictional issues raised by the Motions to which this Affidavit is annexed.

Erich von Abwerken
ERICH VON ABWERKEN

SWORN TO AND SUBSCRIBED before me this 29th day of January, 1968.

Notary Public, State of Florida at Large
My Commission expires:

Notary Public, State of Florida at Large
My Commission Expires Dec. 8, 1970

TOWAGE CONTRACT

(Daily Hire)

It is this day mutually agreed between

ZAPATA OFF-SHORE COMPANY, HOUSTON/TEXAS (hereinafter called "Owners")

and

UNTERWESER REEDEREI GMBH, BREMEN (hereinafter called "URAG"),

Owners of the ocean-going tug "BREMEN",

that the latter shall tow the Drill Barge "CHAPARRAL" (hereinafter called "Object")

Dimensions:		
length of barge hull		180'
overall length		205'
overall width of barge		205'
overall leg length		435'
hull draft	approx.	12'3"
legs' draft	approx.	50'

from Venice (Louisiana)

to a point near Ravenna (Italy), as destined by "Owners".

1. a) Price

The "Owners" shall pay for such operation the sum of US$ 35.000,--
(say thirtyfivethousand US-Dollars)
and a daily hire rate of US$ 1.900,-- (say nineteenhundred US-Dollars)
for all time used by the tug counting from time of arrival at port of departure of the tow (Venice/La.) - not earlier than December 1st, 1967 - until delivery of the "object" at Ravenna.

b) Conditions of Payment

US$35,000 - on arrival of the tug at Venice, Louisiana.

Daily hire to be paid in instalments of 14 days in advance; first instalment being due and payable before the tow leaves Venice/La. Balance, if any, to be settled on delivery of the "object" at destination.

All payments to be made to Chase Manhattan Bank, New York, in favour of URAG.

2. Port Charges and Expenses

a) "Owners" to pay all costs for making the object ready for towing and expenses incurred by the tug and object - hereinafter called "the tow" - on leaving port of departure, at refueling ports "en route", and at arrival at port of destination as port charges, harbour dues, pilot charges, agency fees, Canal tolls, any non-German dues and stamp fees being assessed or levied on the towage price or otherwise arising out of this Agreement and/or service of assisting tugs, where necessary in the tug master's discretion or prescribed by Port Authorities.

b) Customs and/or export/import dues as well as insurance of the "object" shall be for account of the "Owners".

c) URAG shall pay all port charges, harbour dues, pilot charges, agency fees, Canal tolls and other expenses upon or in connection with the tug on arrival at the port of departure of the "tow and upon sailing from point of destination of the "tow" after delivery of the "object".

3. Towing Gear and Runner Crew

URAG to provide towing hawsers, bridles and other towing gear as deemed necessary for the towage service by URAG or their tug master.

URAG to provide a runner crew for the "object", consisting of one Marine Superintendent and 2 seamen. The crew shall be provided at the "Owners'" expense with suitable accommodation, freshwater tanks, life saving appliances and all other requisites, in accordance with the requirements and conditions of the Marine Authorities of the countries concerned; provided, however, that URAG shall be solely responsible for the riding crew at all times.
"Owners" to pay URAG US$ 30,-- per man and per day, counting from the departure from Bremerhaven until arrival at Ravenna. Payment to be effected together with daily hire instalments as per clause 1 b).

4. Seaworthiness

"Owners" to have the "object" in a seaworthy condition for the proposed towage and an approved certificate to such effect issued by a competent and approved surveyor, is to be provided by the "Owners" to URAG or their master on arrival of the tug at port of departure, failing which "Owners" to pay URAG daily hire rate as per clause 1 for the delay involved.

If the towage cannot be started at all, due to "Owners'" inability to obtain the Certificate of Seaworthiness, "Owners" to pay URAG - besides the amount of US$ 35.000,-- (mobilization fee) - the daily hire rate of US$ 1.900,-- for the ballast homeward voyage of the tug to Bremerhaven. If the tug does not return directly to Bremerhaven, time for the return voyage shall be computed on the basis of the tug's normal running time to her port of destination by the customary route.

5. Port of Departure

The "object" shall be delivered to the tug at a place which the tug can safely approach and where she can safely lie always afloat and from where she is permitted to commence towage of the "object" in accordance with local regulations.

The decision of the tugmaster as to the suitability and fitness of any proposed place of delivery to be accepted by the "Owners" as conclusive.

6. Port of Destination

The "object" shall be taken over by the "Owners" or their authorized representative at a place which the "tow" can safely approach and where it can safely lie and manoeuvre, always afloat, and is permitted to go in accordance with local regulations.

7. No Salvage

In the event of the "object" breaking away from the tug during the course of this towage service, the tug shall stand by and render all reasonable service in reconnecting the towline without making any claim for salvage, unless circumstances arise beyond actual contemplation of the towage services.

8. Necessary Deviation

If the tow during the course of the towage puts into a port on account of unseaworthiness of the "object" or because of any other reason not being the fault of the tug, all costs including those for the tug shall be for account of the "Owners". Payment of daily hire as per clause 1 to be continued for all time involved in this deviation.

9. Lien for Towing Charges

URAG shall have an absolute lien on the "object" for the full towing charge and/or all additional compensations due to them under this Agreement including cost of recovery of same,

10. Liberties

The tug may at any time during execution of this contract go to the assistance of vessels in distress - unless such action would put the object under towage in distress - for the purpose of saving life or property, call at any port for fuel, repairs, supplies or other necessaries, or to land disabled seamen. Time spent by the tug under such circumstances shall be considered "off hire".

11. Penalties

URAG shall not be responsible for any consequences arising from the act or error of the "Owners" in connection with export or entry declarations in respect of the tow, and any penalty incurred by URAG or by the tug, her master, officers and crew by reason of such act or default of the "Owners" shall be reimbursed by the "Owners" to URAG in full and any delay caused to be compensated at the rate of daily hire as per clause 1 of this Agreement.

12. Claim and Suit

URAG and the tug, her owners, operators, managers agents, or charterers shall be discharged from liability unless any claim for loss, damage or delay is made in writing within fourteen (14) days from the date of arrival of the tow at destination, or termination of the tow for any reason whatsoever, and action at law or suit in Admiralty is brought to recover thereon within one (1) year after said loss or damage is claimed to have been sustained.

13. War Clause

In case of war, warlike events, restraints of rulers or similar events affecting shipping, URAG is entitled to abstain from the towage contract or from part of it, not yet executed. In this case "Owners" of the "object" acquire no claims against URAG.

14. All type-written inserts to be considered as part of this contract. Supplements and/or deletions valid only if initialed by both parties.

15. "General Towage Conditions" to be considered as integral part of this towage contract.

GENERAL TOWAGE CONDITIONS

1. For the execution of the towage contract it is agreed that the tug represents only the motive power of the towed object.

URAG, their masters and crews are not responsible for defaults and/or errors in the navigation of the tow.

2. a) For damages suffered by the tug the Owners of the towed object are responsible unless they prove that those damages are caused by default of the tug.

For loss or damages which the tug suffers through her own fault by collision with third parties the tug shall only be responsible in so far as such loss or damages are not occasioned or contributed to by the towed object.

b) Damages suffered by the towed object are in any case for account of its Owners.

c) Damages caused to third parties by the tug and/or the towed object are to be made good by the Owners of the towed object. This does not apply if they prove that damages are caused entirely by default of the tug.

3. The owners of the tug cannot be held liable if for unforeseen reasons the voyage cannot be started at all, if the commencement of the voyage is delayed or if any stay and/or delay occur during the voyage. The owners of the tug are particularly not liable for breaking or slipping of tow ropes and/or towing gear, premature shortage of bunkers on account of bad weather, delay, damages or loss due to the Act of God, Force Majeure, perils of the Sea, strikes, lock-outs, labour troubles, enemies, hostilities, war, epidemic, quarantine, embargo, restraint of any government, rulers or people, salvage operations or any other kind of assistance.

4. As far as the liability of the tug is excluded or has been taken over by the owners of the towed object, the latter are also under obligation of keeping the tug owners indemnified for all claims of third parties or to indemnify them for any claim already realized by them. This also applies if the owners of the towed object call on third parties and the latter try to recover against the tug owners.

   The Owners of the object have the same obligation towards employees and agents of the tug owners.

   Furthermore they are obligated not to sue the employees and agents themselves.

5. The towage rates agreed do not include any special performance of the tug such as assistance for stranded vessels or for vessels in distress, especially not included is remuneration for salvage even in case that stranding, other distress or salvage case occurred in the course of the towage, except as provided by clause 7 of towage contract.

6. If and in so far one of the aforementioned clauses should be declared null and void totally or partially, nevertheless the other clauses or the rest of the clause in question remain in force.

7. For the towage contract and its general conditions the following words are defined:

   a) "tug" = tugs owned or operated by the tug owners including crews.

   b) "towed objects" = objects of the contract including crews, regardless of being provided by the Owners of the object or the tug owners.

   c) "damage" = damage to property or persons.

   d) "third parties" = property and persons beyond the limits of the towage contract.

   e) "employees" = all persons of the tug owners entered into service-contracts with them.

   f) "agents" = third firms and persons, engaged by the tug owners without service-contracts for the performance of the towage contract.

   g) "towage contract" = contract covering all kinds of moving and assisting of objects.

   h) "Owners of the towed object = contract partner of the tug owners.

8. Any dispute arising must be treated before the London Court of Justice.

Bremen, November 3, 1967

UNTERWESER REEDEREI G.m.b.H.

ZAPATA OFF-SHORE COMPANY

Filed Tampa, Fla., Jan. 29, 1968 No. 68-21-Civ-T

MOTION FOR PROTECTIVE ORDER AND ORDER QUASHING SUBPOENAE

COME NOW Attorneys for Defendants, M/S BREMEN and UNTERWESER REEDEREI GMBH, and respectfully move the Court for a Protective Order terminating the taking of depositions noticed pursuant to Sections 863, 864 and 865, Revised Statutes of the United States (28 U.S.C.A., § § 639, 640 and 641 [1940 Ed.], and for an Order Quashing Subpoenae served pursuant to such Notices, and show unto the Court as follows:

1. On or about January 11, 1968, Plaintiff, ZAPATA OFF-SHORE COMPANY, by and through their attorneys, filed its Complaint against Defendants, M/S BREMEN and UNTERWESER REEDEREI, GMBH, alleging a maritime claim arising out of an incident occurring in the Gulf of Mexico on or about January 9, 1968, while the drilling rig CHAPARRAL, owned by Plaintiff, was under tow by the M/S BREMEN. On or about January 13, 1968, Plaintiff noticed depositions of some 23 crew members of the M/S BREMEN, stating in the Notices that said depositions would be taken in accordance with Sections 863, 864 and 865, Revised Statutes of the United States (28 U.S.C.A., §§ 639, 640 and 641 [1940 Ed.]. In conjunction with said Notices, some sixteen subpoenae were served on crew members of the M/S BREMEN listed in said Notices, commanding them to appear for the taking of depositions as aforesaid.

2. Thereafter and following hearing before this Court on the order in which said depositions would be scheduled, the taking thereof commenced at approximately 10:00 a.m. Tuesday, January 16, 1968, and continued from day to day thereafter up to and including 10:30 o'clock p.m., Saturday night, January 27, 1968.

3. During the week of January 15th, counsel for Plaintiff and Defendants negotiated with respect to the form of a "Letter of Undertaking" to be furnished by the Lon-

don underwriters of the M/S BREMEN. The final form of said Letter was agreed upon on January 17th and on January 19th the original of said Letter was delivered to counsel for Plaintiff and in accordance therewith, the M/S BREMEN was released from attachment.

4. Prior hereto, Defendants have filed no Motions or responsive pleadings to the Complaint, but contemporaneously with this Motion are filing with this Court Motions averring *inter alia* lack of jurisdiction, improper venue and forum non conveniens. Pending the disposition of said Motions, which will require the taking of depositions limited to the issue of jurisdiction, Defendants are precluded from pursuing remedies and procedures otherwise available in order that the jurisdictional question not be prejudiced thereby. Furthermore, pending final disposition of Defendants' Motions, the pursuance of discovery could well be of no practical utility if the court, upon hearing, should determine that the cause was improperly brought in this jurisdiction and should be referred to a foriegn jurisdiction.

5. Although Defendants, by and through their counsel, in a good faith effort to comply with the Notices of Depositions and Subpoenae served as aforesaid, made two (2) witnesses available for extensive examination on five (5) successive days, it became readily apparent that the purposes of said depositions were not in accordance with the Statutes cited as authority therefor, and in any event, severely prejudiced Defendants due to the fact that issue in the case was not joined, as well as the lack of familiarity and information as to the material facts within the exclusive knowledge, control and possession of Plaintiff.

6. Defendants respectfully submit unto the Court that the continued taking of depositions by Plaintiff at this stage in the litigation is not in accord with the purpose and scope of the *de bene esse* Statute, and in any event, constitutes an unwarranted prejudice to the rights of these Defendants in a serious and complex litigation for the following reasons, among others:

(a) The relief provisions of Rule 30(b), Federal Rules of Civil Procedure, are applicable in admiralty to depositions taken pursuant to the *de bene esse* Statute. *In re China Merchants Steam Navigation Co.*, 259 Fed. Supp. 75 (S.D. N.Y. 1956).

(b) The use of the *de bene esse* Statute for discovery purposes is improper. *Atlass v. Miner*, 265 F.2d 312 (7th Cir. 1959) Affm'd. U. S. Supreme Ct., 363 U. S. 641; 3*Benedict on Admiralty*, 6th Ed. § 386; *Green v Victor Talking Machine Co.*, 15 F.2d 869 (E.D.N.Y. 1926).

(c) Depositions *de bene esse* are not favored prior to joinder of issue. *Oklahoma Gas and Electric Co. v Bates Expanded Steel*, 296 F. 281 (D.C. Del. 1924).

(d) When jurisdiction of the Court is an issue, such question should be determined prior to discovery as to the merits of the cause. *Allied Poultry Processors Co. v. Polin*, 134 F.Supp. 278 (D. Del. 1955).

(e) In Admiralty, Defendants should be given reasonable opportunity to meet the issues before being compelled to undergo unilateral discovery by Plaintiff. *Darling's Estate v. Atlantic Contracting Corp.*, 150 F.Supp. 578 (E.D. Va. 1957).

(f) The rights of either party in a complex and serious litigation should not be prejudiced in favor of the first party undertaking discovery. *Caldwell-Clements, Inc. v. McGraw-Hill Publ. Co.*, 11 F.R.D. 156 (S.D.N.Y.

WHEREFORE, Defendants pray that this Court enter its Order terminating examination pursuant to Notices of Depositions *de bene esse*, served by plaintiff, and enter its Order quashing the subpoenae served pursuant to said Notices.

David C. G. Kerr
David C. G. Kerr of
MACFARLANE, FERGUSON, ALLISON & KELLY
P.O. Box 1531 - Tampa, Florida 33601
ATTORNEYS FOR DEFENDANTS

Filed Tampa, Fla., Jan. 29, 1968 No. 68-21 Civ-T

MOTION TO COMPEL DEFENDANT TO PROCEED WITH DEPOSITIONS

ZAPATA OFF-SHORE COMPANY, Plaintiff, moves the Court to order Unterweser Reederei GMBH and the M/S BREMEN, defendants, to proceed with the depositions heretofore noticed in this cause and to produce the employees of the defendant for such depositions, without further delay.

As grounds for this motion the plaintiff respectfully shows that the depositions have been scheduled since January 12 and 13, 1968, that depositions commenced on January 23, 1968, after several delays requested by defendant, and continued intermittently through January 27, 1968, when at the defendant's request the deposition of the chief officer was recessed to be resumed on the morning of Sunday, January 28, 1968. However, on the morning of January 28, 1968, the defendant did not produce the chief officer for the completion of his deposition and further stated that defendant would not proceed with any of the remaining scheduled depositions pending further order of Court on motions defendant intended to file.

MEMORANDUM IN SUPPORT OF MOTION

FACTS

This suit arises out of the loss at sea of three legs of the drilling rig CHAPARAL, owned by plaintiff. The resultant damages and losses sustained by the plaintiff are in excess of $3,500,000, as well as can so far be determined.

Plaintiff commenced this action on January 12, 1968, in rem against the M/S BREMEN and in personam against its owner, Unterweser Reederei GMBH. On the same date the M/S BREMEN was arrested in Tampa Bay, under process of this Court, and Unterweser Reederei GMBH was served with process in personam.

This Court now has jurisdiction of the subject matter, of Unterweser Reederei GMBH, in personam and of the M/S BREMEN, in rem. *Carbon Black Export, Inc. vs. Steamship Monrosa,* and *Navigazione Alta Italia,* 254 F. 2d 297; 1958 A.M.C. 1335; affirmed U. S. Supreme Court, 359 U. S. 180, 1959 A.M.C. 1327.

On January 12 and 13, 1968, plaintiff served defendants with notice of taking the depositions of the persons who were aboard the M/S BREMEN and the drilling rig on the voyage on which the casualty out of which this suit arises occurred, to commence on January 15, 1968. These depositions were deferred five times at the request of defendants and finally commenced on Tuesday, January 23, 1968 at 10:00 A.M.

From the commencement of the depositions through 10:35 p.m. on January 27, 1968, a total of 28 hours, 55 minutes was actually spent in taking depositions, all with the use of an interpreter, and notwithstanding plaintiff's repeated offers to go on with the depositions early or late, at any time to suit the convenience of the defendants. Of the total time so far expended only one hour fifty minutes was at night.

During the five days during which depositions have been taken, plaintiff has waited upon the arrival of the defendants to commence or resume depositions, after the previously agreed time, a total of just over four hours.

Of the twenty-four witnesses who are employees of Unterweser Reederei GMBH whose depositions have been noticed, nineteen are under the subpoena of this Court and defendant has agreed that the remaining five such witnesses will be produced for these depositions without being served with subpoenas. All have been in Tampa and subject to such service since January 12, 1968.

From the evidence so far developed it is clear that the responsibility for the navigation of the flotilla on the voyage out of which this suit arises was exclusively that of the defendants.

Plaintiff has so far taken the deposition of Unterweser Reederei's Port Captain, Otto Litwinski, who was in charge of Unterweser's "runner crew" on the CHAPARRAL and the master of the M/S BREMEN, Captain D. Kriete and has almost completed the deposition of the BREMEN'S First Officer, Mr: D. Spannhake.

All of the Unterweser Reederei employees whose depositions have been noticed are German and, upon information and believe, are residents of Germany. All of them are about to leave the United States on a voyage by sea.

The facts of the voyage and events immediately prior to its commencement are now fresh in the memory of the witnesses.

All of the Unterweser Reederei employees are seamen. Once they leave Tampa there is no knowing where or when they may later be deposed. This is a commonplace of admiralty litigation.

These depositions are noticed de bene esse under the procedure expressly preserved for admiralty actions in Rule 26, F.R.C.P. and Sections 863 through 865 of the Revised Statutes of the United States. See note preceding Section 1781 of Title 28, U.S.C.A.

To stop these depositions now, when the witnesses are all at hand and under subpoena, and put them off to some future date when they will be no one knows where, beyond the reach of process so that plaintiff may have to go all over the world to get their testimony, would, we submit, constitute harrassment of the plaintiff.

Plaintiff has carefully considered what remains to be done and, in the light of the experience gained in the taking of the depositions to date, believes that, with the cooperation of the defendants, the plaintiff's examination of the remaining Unterweser Reederei employees can be completed in twelve and a half hours.

Plaintiff submits the defendants should be ordered to proceed with the depositions of the Unterweser Reederei GMBH employees without further delay.

Respectfully,
BAKER, BOTTS, SHEPHERD & COATES
Esperson Building
Houston, Texas
By: *James K. Nance*
FOWLER, WHITE, COLLINS, GILLEN, HUMKEY & TRENAM
By: *Dewey R. Villareal, Jr.*
P.O. Box 1438, Tampa, Florida
Attorneys for Plaintiff

Filed, Tampa, Fla., Feb. 16, 1968 No. 68-21 Civ-T

NOTICE OF TAKING DEPOSITIONS

TO: James K. Nance, Esquire
Baker, Botts, Shepherd & Coates
1600 Esperson Building
Houston, Texas 77002
Dewey R. Villareal, Jr., Esquire
Fowler, White, Collins, Gillen, Humkey & Trenam
P. O. Box 1438
Tampa, Florida
Attorneys for Plaintiff

PLEASE TAKE NOTICE that commencing on the 22nd day of February, 1968, the Defendant, UNTERWESER REEDEREI GMBH, will take the depositions upon oral examination of the below listed persons, on the dates and at the times listed with respect to each such witness, before RICHARD H. LEE, JR., a notary public or some other person duly authorized by law to take depositions in the aforesaid place, at the offices of Lee and Nicodemus, 922 First Federal Building, 220 Madison Street, Tampa, Florida. The said depositions will be taken for the purpose of discovery, for use at trial, and for such other purposes as are permitted under applicable statutes and rules of civil procedure. The

depositions will continue from day to day until completed.

PLEASE GOVERN YOURSELVES ACCORDINGLY.

1. OSCAR D. WILLARD, February 22, 1968, at 9:30 a. m.

2. WILTON JOHNSON, February 23, 1968, at 9:30 a. m.

3. OSCAR W. PAUL, February 23, 1968, at 1:30 p. m.

4. NOLAN R. GAMBLE, February 23, 1968, at 2:30 p. m.

5. SAMUEL K. PRICE, February 23, 1968, at 3:30 p. m.

6. BILLY C. BURKE, February 23, 1968, at 4:30 p. m.

7. EARL B. RICHIE, February 23, 1968, at 5:30 p. m.

8. L. J. FRUGE, February 23, 1968, at 6:30 p. m.

Jack C. Rinard
JACK C. RINARD
OF
MACFARLANE, FERGUSON, ALLISON & KELLY
P. O. Box 1531, Tampa, Florida 33601
ATTORNEYS FOR DEFENDANT

Filed, Tampa, Fla., Feb. 20, 1968 No. 68-21 Civ-T

NOTICE OF TAKING DEPOSITIONS UPON ORAL EXAMINATION

TO: Macfarlane, Ferguson, Allison & Kelly
P. O. Box 1531 - Hillsboro Hotel Bldg.
Tampa, Florida
—and—
Faris, Ellis, Cutrone, Gilmore & Lautenschlaeger
Whitney Building
New Orleans, Louisiana 70130
Attorneys for Claimant-Defendant Unterweser Reederei GMBH.

PLEASE TAKE NOTICE that the plaintiff Zapata Off-Shore Company will take the depositions upon oral examination of the below listed witnesses on the dates and at the times shown with respect to each such witness, before Earl Christenberry, a Notary Public, or some other officer authorized by law to take depositions, at the offices of Jones, Walker, Waechter, Poitevent, Carrere & Denegre, 28th Floor, 225 Baronne Street, New Orleans, Louisiana. The said depositions will be taken for the purpose of use as evidence in the action, not for discovery, in accordance with the Federal Rules of Civil Procedure. The oral examinations will continue from day to day until completed. You are invited to attend and cross-examine.

1. Noel Thompson on Wednesday, March 13, 1968
   225 Baronne Street at 9:00 a. m.
   New Orleans, La.

2. John Hellendoorn on Wednesday, March 13, 1968
   Salvage Association at 11:00 a. m.
   London
   New York City Office

3. James Booth on Wednesday, March 13, 1968
   1700 Houston Club Bldg. at 1:00 p. m.
   Houston, Texas

4. Hoyt Taylor on Wednesday, March 13, 1968
   1700 Houston Club Bldg. at 3:00 p. m.
   Houston, Texas

BAKER, BOTTS, SHEPHERD & COATES
1600 Esperson Building
Houston, Texas 77002
By: *James K. Nance*
and
FOWLER, WHITE, COLLINS, GILLEN, HUMKEY and TRENAM
P. O. Box 1438, Tampa, Florida
By: *Dewey R. Villareal, Jr.*
Attorneys for Plaintiff

Filed, Tampa, Fla., Feb. 27, 1968 No. 68-21 Civ-T

MOTION FOR PRODUCTION OF DOCUMENTS

Defendant, UNTERWESER REEDEREI GMBH, pursuant to Rule 34 Federal Rules of Civil Procedure, moves the Court for an order requiring Plaintiff, ZAPATA OFF-SHORE COMPANY, to produce and to permit Defendant to inspect and copy each of the following documents and objects:

1. The negatives and/or copies of Exhibits 16-1 through 16-5 which were marked for identification by Plaintiff during the deposition of Otto Litwinski and which are photographs of portions of the drill barge CHAPARRAL.

2. Translated copies of all log books produced by Defendants during the depositions of: Otto Litwinski; Captain Kriete; the crew of the M/S BREMEN.

3. All weather reports obtained by Plaintiff relating to the proposed tow voyage of the drill barge CHAPARRAL from Venice, Louisiana, to Ravenna, Italy, including but not limited to all weather reports obtained during the period of January 1, through January 12, 1968.

4. All weather reports transmitted by Plaintiff relative to the proposed tow voyage of the drill barge CHAPARRAL from Venice, Louisiana, to Ravenna, Italy, including but not limited to weather reports transmitted during the period of January 1, through January 12, 1968.

5. All radio logs maintained by the Plaintiff at any place from January 1, through January 12, 1968.

6. Strain gauge recording charts from the bow, port and starboard legs of the drill barge CHAPARRAL reflecting tracings made during the period of January 5, 1968, through January 9, 1968.

7. All written instructions, memoranda, and correspondence promulgated by Plaintiff to its officers, agents,

and employees relative to the use of strain gauge recorders.

8. All maintenance and operational manuals and written instuctions issued by the manufacturer of the strain gauge recorder aboard CHAPARRAL.

9. All written instructions, memoranda, or correspondence from the manufacturer of the strain gauge recorders aboard CHAPARRAL and from the builder of the CHAPARRAL, relative to the installation, operation and use of the strain gauge recorders aboard CHAPARRAL.

10. All official Ship's Documents of the CHAPARRAL including but not limited to certificate of enrollment, certificate of registration, crew list, and cargo manifest.

11. All written instructions, memoranda, or correspondence relative to the maintenance of CHAPARRAL, her machinery, and equipment promulgated by the builder of CHAPARRAL, including but not limited to the "Maintenance Manual" for CHAPARRAL.

12 All written instructions, memoranda, or correspondence promulgated by Plaintiff relative to the maintenance of CHAPARRAL and her machinery and equipment.

13. All instructions, memoranda, and correspondence promulgated by Plaintiff relative to operating procedures on CHAPARRAL, including but not limited to the "Operational Instructions for The LeTourneau Wide Base Platform".

14. All drawings, plans or specifications relating to (1) modifications of CHAPARRAL and (2) preparation of CHAPARRAL for the tow voyage, including but not limited to the following items:

a. Reinforcement of legs.
b. Installation of crane and elevator on port leg.
c. Installation of additional bow tanks.
d. Installation of additional stern tanks.
e. Installation of "Locking Devices".

15. All instructions, memoranda, and correspondence, (1) promulgated by Plaintiff or (2) promulgated by the manufacturer, in the possession, custody or control of Plaintiff, relating to the manufacture, installation and operation of the "Locking Devices".

16. Copy of the contract between Plaintiff and the Italian corporation, company, partnership or other business entity relating to the employment of CHAPARRAL in or around Italy, including all correspondence, memoranda, price quotations, bids, telegrams and/or cables relating to said contract.

17. All correspondence, memoranda, written instructions, certificates, documents, telegrams and/or cables relating to (1) the proposed towage contract and (2) the proposed tow voyage with UNTERWESER REEDEREI.

18. All written instructions, correspondence, and memoranda, between Plaintiff and (1) London Salvage Association and (2) agents of London Salvage Association related to the tow voyage of CHAPARRAL.

19. All written instructions, reports, correspondence and memoranda between Plaintiff and United States Coast Guard, including but not limited to inspections of CHAPARRAL by the United States Coast Guard relating to CHAPARRAL.

20. All written instructions, correspondence, and memoranda with the Ship's agent of CHAPARRAL relating to the tow voyage.

21. All correspondence, reports, written instructions and memoranda from or to United States Customs relating to the voyage of CHAPARRAL.

22. All written instructions, correspondence, and memoranda from Management to any of the following, relating to (1) the proposed tow voyage and (2) preparation for tow of CHAPARRAL;

a. Jim Booth
b. Buster Wittington
c. Hoyt Taylor
d. Walley Fenner
e. Oscar Willard
f. Wilton Johnson
g. Otto Litwinski
h. Captain Kriete

23. Copies of any technical reports or calculations, of any nature, made for or received by Plaintiff in contemplation of the tow voyage of CHAPARRAL, including but not limited to those relating to stability, hull stresses, hogging and sagging stresses, leg stresses, limitation of leg stresses, weights added prior to departure and weights at departure.

24. Copies of employment contracts between Plaintiff and Plaintiff's riding crew aboard CHAPARRAL.

25. All documents, certificates, correspondence, instructions and memoranda between Plaintiff and surveyors employed by Plaintiff in connection with the tow voyage of CHAPARRAL, including but not limited to Hayes, Thompson and Hellendoorn.

26. All documents, correspondence, written instructions and memoranda between Plaintiff and Marine Engineers, ship yards, and naval architects employed by Plaintiff in connection with the tow voyage of CHAPARRAL.

27. All documents, written instructions, correspondence, memoranda and telegrams between Plaintiff and R. G. Le Tourneau relating to any work to be performed in connection with the tow voyage of CHAPARRAL.

28. Copies of the original and amended Displacement Scales for CHAPARRAL.

29. The sound recording tapes made by Samuel K. Price, Motorman, of noises aboard CHAPARRAL while under tow.

30. The sound recording tape log kept by Samuel K. Price, Motorman, in connection with the recording of noises aboard CHAPARRAL while under tow.

31. The log book maintained by Samuel K. Price, Motorman, relating to trim and ballast conditions of CHAPARRAL.

32. 480 feet of 16 millimeter color film taken by Samuel K. Price, Motorman, of CHAPARRAL while under tow.

33. All written instructions, correspondence, and memoranda relating to the taking of sound recordings and movies aboard CHAPARRAL while under tow.

Plaintiff has the possession, custody, or control of each of the foregoing documents and objects, each of which constitute or contain evidence relevant and material to a matter involved in this action, as is more fully shown in Exhibit "A" hereto attached.

David C. G. Kerr
DAVID C. G. KERR OF
MACFARLANE, FERGUSON, ALLISON & KELLY
P. O. Box 1531, Tampa, Florida 33601
—and—
FARIS, ELLIS, CUTRONE, GILMORE & LAUTENSCHLAEGER
Whitney Building, New Orleans, Louisiana
ATTORNEYS FOR DEFENDANT

Filed, Tampa, Fla., Mar. 15, 1968. No. 68-21 Civ-T

AMENDED NOTICE OF TAKING DEPOSITIONS UPON ORAL EXAMINATION

TO: Macfarlane, Ferguson, Allison & Kelly
P. O. Box 1531
Tampa, Florida
—and—
Faris, Ellis, Cutrone, Gilmore & Lautenschlaeger
Whitney Building
New Orleans, Louisiana 70130
Attorneys for Claimant-Defendant Unterweser Reederei GMBH

PLEASE TAKE NOTICE that the plaintiff Zapata Off-Shore Company, will take the depositions upon oral examination of the below listed witnesses on the dates and at the times shown with respect to each such witness, before Earl Christenberry, a Notary Public, or some other officer authorized by law to take depositions, at the offices of Jones, Walker, Waechter, Pointevent, Carrere & Denegre, 28th Floor, 225 Barrone Street, New Orleans, Louisiana. The said depositions will be taken for the purpose of use as evidence in the action, not for discovery, in accordance with the Federal Rules of Civil Procedure. The oral examinations will continue from day to day until completed. You are invited to attend and cross-examine.

1. Noel Thompson
   225 Barrone Street
   New Orleans, Louisiana
   — Tuesday, April 9, 1968
   9:00 a. m.

2. John Hellendoorn
   Salvage Assoc., London
   New York City Office
   — Tuesday, April 9, 1968
   11:00 a. m.

3. Kenneth Price
   739 Cunningham
   Gainesville, Texas
   — Tuesday, April 9, 1968
   1:00 p. m.

BAKER, BOTTS, SHEPHERD & COATES
1600 Esperson Building
Houston, Texas 77002
—and—
FOWLER, WHITE, COLLINS, GILLEN, HUMKEY & TRENAM
P. O. Box 1438, Tampa, Florida
Attorneys for Plaintiff
By: Original signed by D. R. Villareal, Jr.

Filed, Tampa, Fla., Mar. 15, 1968 No. 68-21 Civ-T

NOTICE OF TAKING DEPOSITIONS

TO: James K. Nance, Esquire
Baker, Botts, Shepherd & Coates
1600 Esperson Building
Houston, Texas 77002
Dewey R. Villareal, Jr., Esquire
Fowler, White, Collins, Gillen, Humkey & Trenam
P. O. Box 1438
Tampa, Florida
Attorneys for Plaintiff

PLEASE TAKE NOTICE that commencing on the 9th day of April, 1968, the Defendant, UNTERWESER REEDEREI GMBH, will take the depositions upon oral examination of the below listed persons, on the dates and at the times listed with respect to each such witness, before Earl Christenberry, a Notary Public, or some other officer authorized by law to take depositions, at the offices of Jones, Walker, Waechter, Pointevent, Carrere & Denegre, 28th Floor, 225 Baronne Street, New Orleans, Louisiana. The said depositions will be taken for the purpose of discovery, in accordance with the Federal Rules of Civil Procedure. The depositions will continue from day to day until completed.

PLEASE GOVERN YOURSELVES ACCORDINGLY.

1. Noel Thompson — on April 9, 1968
225 Baronne Street — at 9:00 A. M.
New Orleans, Louisiana

John Hellendoorn — on April 9, 1968
Salvage Association — at 11:00 A. M.
London
New York City Office

JACK C. RINARD
MACFARLANE, FERGUSON, ALLISON & KELLY
P. O. Box 1531, Tampa, Florida 33601
and
FARIS, ELLIS, CUTRONE, GILMORE & LAUTENSCHLAEGER
Whitney Building, New Orleans, Louisiana
ATTORNEYS FOR DEFENDANT

No. 68-21 Civ-T

MEMORANDUM BRIEF

I. INTRODUCTION

On January 29, 1968, Defendant, UNTERWESER REEDEREI GMBH, filed its alternative Motions to Dismiss on the Ground of Lack of Jurisdiction, for an Order Declining Jurisdiction and/or an Order Staying Further Prosecution of Proceedings. Defendant also filed the Affidavit of Erich Von Aswegen, a Managing Director of Defendant, a copy of the towage contract between Plaintiff and Defendant and a Memorandum Brief in support of its motion. This Memorandum Brief supplements the previously filed Memorandum of Law.

II. FACTUAL BACKGROUND

This case involves a casualty which occurred during performance of a Towage Contract executed in Bremen, Germany, on November 3, 1967. Pursuant to such contract Defendant agreed to tow Plaintiff's drill barge CHAPARRAL from Venice, Louisiana, to Ravenna, Italy. A copy of the executed Towage Contract is attached as Exhibit 1 to the Affidavit of Erich Von Aswegen. In course of the tow voyage the drill barge CHAPARRAL suffered a casualty and was towed into Tampa, Florida, by the Defendant's Tug M/S BREMEN. On arrival at Tampa, Florida, Plaintiff caused M/S BREMEN to be arrested by the United States Marshal pursuant to practice in Admiralty proceedings.

III. ISSUE PRESENTED BY DEFENDANT'S MOTION

The basic issue presented by Defendant's Motion is whether Plaintiff has rightfully brought suit in this court. Rather than being strictly jurisdictional, the issue is whether Plaintiff can be permitted to proceed in this forum contrary to its contract obligation, to the prejudice of Defendant. The court must decide whether, in light of the law and circumstances of this case, it will

give effect to expressed contractual intent of the parties and thereby decline to exercise its jurisdiction.

In the jurisdictional clause of the towage contract, found in paragraph 8 of the "General Towage Conditions", Plaintiff and Defendant agreed to submit any disputes arising to the London Court of Justice.

* * *

Respectfully submitted,
DAVID C. G. KERR
OF
MACFARLANE, FERGUSON, ALLISON & KELLY
P. O. Box 1531, Tampa, Florida 33601
—and—
FARIS, ELLIS, CUTRONE, GILMORE & LAUTENSCHLAEGER
Whitney Building, New Orleans, Louisiana
ATTORNEYS FOR DEFENDANT

1968 — 000000 No. Folio 64

In the High Court of Justice

PROBATE DIVORCE & ADMIRALTY DIVISION

(ADMIRALTY)

A. 9

Notice of Writ to be served out of Jurisdiction (App. A, No. 9)

The Solicitors' Law Stationery Society Limited
Shaw's Inn
Fetter Lane
E.C.4

Between UNTERWESER REEDEREI GESELLSCHAFT mit BESCHRANKTER HAFTUNG

PLAINTIFFS

AND

ZAPATA OFF-SHORE COMPANY

DEFENDANTS

To Zapata Off-Shore Company

of 2000 Southwest Tower, Houston, Texas 77002 in the United States of America

Take Notice that

Unterweser Reederei Gesellschaft mit Beshrankter Haftung

of Blumenthalstrasse 15/16, 28, Bremen 1 in the German Federal Republic

have begun an action against you Zapata Off-Shore Company

in Her Majesty's High Court of Justice in England by Writ of Summons dated the 21st day of February 1968; which Writ is indorsed as follows:—

Copy the indorsement.

The Plaintiffs claims are for hire and other monies due under a Contract between the parties dated 3rd November, 1967 for the towage by the Plaintiffs of the Defendants' Drill Barge "CHAPARRAL" from Venice, Louisiana in the United States of America to Ravenna, Italy and damages for breach by the Defendants of such Contract.

The Plaintiffs are a Company incorporated outside the Scheduled Territories as defined by the Exchange Control Act, 1947 and who carry on business at the address shown below.

This Writ was issued by Richards, Butler & Co. of Stone House, 128/140, Bishopsgate, London, E.C.2. Solicitors for the said Plaintiffs who are a Company incorporated according to the laws of the German Federal Republic and who carry on business at Blumenthalstrasse 15/16, 28, Bremen 1.

EXHIBIT "B"

and you are required within 17 days after receipt of this notice, inclusive of the day of receipt, to cause an appearance to be entered for you in the said Court to the said action, and in default of your so doing the said

Unterweser Reederei Gesellschaft mit beschr. Haftung

may proceed therein and judgment may be given in your absence.

You [may enter an appearance ~~in person~~ or by a Solicitor either (1) by handing in the appropriate forms, duly completed, at ~~the Central Office~~ [or the Admiralty Registry], Royal Courts of Justice, Strand, London, W.C.2 [~~or the Principal Probate Registry, Somerset House, Strand, London, W.C.2~~], or (2) by sending them to that office by post.

* This paragraph must be deleted if Writ is not indorsed with statement of claim.

* ~~[If you enter an appearance, then, unless a summons for judgment~~ is served on you in the meantime, you must also ~~serve a defence~~ on the Solicitor for the Plaintiff within ~~14 days~~ after the last day of the time limited for entering an appearance, otherwise judgment may be entered ~~against you without notice.]~~

(Signed) Richards Butler & Co

of Stone House, 128/140, Bishopsgate, London, E.C.2.

~~[Agent for~~

~~of~~

Solicitor for the said Plaintiffs.

This notice was served by me at Wilmington, Delaware on the Defendant Zapata Off-Shore Company by serving Joanna Miller, Assistant Secretary of ~~on the Defendant~~ Corporation Trust Company Resident Agent for defendant, personally on Thursday, the 14th day of March 1968.

Indorsed the 14th day of March 1968.

(Signed) [signature]
Deputy Sheriff

(Address) Wilmington, Delaware

AFFIDAVIT OF SERVICE

STATE OF DELAWARE

COUNTY OF NEW CASTLE

LEO O'CONNOR being duly sworn, deposes that he is a Deputy Sheriff and avers that he served upon and left personally with Joanna Miller, Ass't. Secretary of Corporation Trust Company resident agents for of Zapata Off-Shore Company, at 100 West 10th St. Wilm. Delaware a true and correct copy of Summons on the 14th day of March A.D. 1968.

The deponent further avers that he knew the person so served to be the same person as mentioned in the complaint.

Officer

Deputy Sheriff
Title

Wilmington, Delaware
Address

STATE OF DELAWARE

COUNTY OF NEW CASTLE

BE IT remembered that on this 14th day of March A.D. 1968 personally came before me the Subscriber, a Notary Public of the State of Delaware, Leo A. O'Connor a Deputy Sheriff of New Castle County and State of Delaware, and stated that the facts stated above are true and correct.

SWORN TO AND SUBSCRIBED Before me the day and year aforesaid.

Notary Public

EXHIBIT "B"

State of Delaware,
New Castle County, } ss.

I, JOHN F. HYDE, Prothonotary of the Superior Court of the State of Delaware, in and for New Castle County, which Court is a Court of Record, DO HEREBY CERTIFY,

THAT _____, by whom the foregoing affidavit or acknowledgement is certified, now is and was at the date of said affidavit or acknowledgement a Notary Public for the State of Delaware residing in New Castle County, and duly commissioned and qualified as such to take acknowledgements to all deeds and instruments in writing and administering oaths and take affidavits within said State, that I am well acquainted with the handwriting of said Notary Public and verily believe that the signature to said certificate of proof or acknowledgement is genuine.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court, the _____ day of _____, 19__

_____
Prothonotary of the Superior Court.

FOR CONSULAR AUTHENTICATION or State, AND SIGNATURE SEE REVERSE

EXHIBIT "B"

BRITISH CONSULATE GENERAL, PHILADELPHIA, PA., U.S.A.

I, MAY J. MACFARLANE, British Vice Consul at Philadelphia certify that the signature of "JOHN F. HYDE" and Seal appearing on the reverse side are respectively the signature of the Prothonotary of the Superior Court and Seal of the Superior Court of Delaware, New Castle County, State of Delaware.

This 26th day of March, 1968, at the British Consulate General, Philadelphia.

May J. MacFarlane
BRITISH VICE CONSUL.

FOREIGN SERVICE — CONSULATE GENERAL — 27 MAR 1968 — PHILADELPHIA — FOREIGN SERVICE

No responsibility is accepted for the contents of the attached document.

Filed, Tampa, Fla., April 22, 1968 No. 68-21 Civ-T

STATEMENT OF FACTS

Plaintiff represents that the following facts are true in connection with its opposition to plaintiff's motion to dismiss, or to decline jurisdiction:

I The plaintiff, Zapata Off-Shore Company (hereinafter called "Zapata"), is a citizen of the United States, being duly incorporated under the laws of the State of Delaware, with its principal office and place of busines located in Houston, Texas. See annexed Affidavit of Carl R. Apthorp, Secretary of Zapata, to which is attached Certificate of Good Standing issued on March 11, 1968, by the Secretary of State of the State of Delaware.

II. The Drill Barge (Rig) CHAPARRAL, an American vessel, has been solely owned by Zapata since March, 1966, and still is. It is duly registered by Zapata under the laws of the United States with the United States Coast Guard, Department of Transportation of the United States. See annexed Affidavit of Carl R. Apthorp, Secretary of Zapata, to which is attached certified copy of "Certificate of Registry" issued on January 2, 1968. Its official number is 504200.

III. All members of the Board of Directors and all of its officers who manage the business affairs of Zapata are resident citizens of the United States. 97.7% of the outstanding common stock of Zapata was held by residents of the United States as of January 15, 1968. See annexed Affidavit of Carl R. Apthorp, Secretary of Zapata.

IV. (a) There were seven employees of Zapata and one catering company's employee on board the CHAPARRAL during the voyage involved in this suit. They are American citizens whose permanent addresses are in the United States. They are Oscar Willard, Wilton Johnson, Oscar W. Paul, Kenneth Price, Billy C. Burke, Earl B. Richie, Nolan R. Gamble and L. J. Fruge.

Their depositions have been taken. Nevertheless, Zapata plans to bring some or all of these witnesses to the trial.

(b) Zapata plans to call as witnesses at the trial of this case the following officers or employees of Zapata: (1) Hoyt Taylor, Vice President and Chief Engineer, Houston, Texas; (2) L. V. Whittington, Manager of Operations, Houston, Texas; (3) Wiley C. Fenner, Senior Drilling Superintendent, Houston, Texas; and (4) James Booth, Engineer, Houston, Texas.

V. Zapata plans to call as witnesses at the trial the following persons (not employees of Zapata):

(1) Noel Thompson, Resident Surveyor for Salvage Association, London, who resides in New Orleans, Louisiana.

(2) Captain John H. W. Hellendoorn, Staff Marine Surveyor for Salvage Association, London, who resides in New Jersey.

These two men participated in the pre-voyage survey of the CHAPARRAL.

(3) A representative of Breit Engineering Company of New Orleans, Louisiana, a naval architectural firm, who has knowledge of the stability of the CHAPARRAL.

(4) Joseph Tynan, Marine Surveyor, resident of New Orleans, Louisiana, who made a post-casualty damage survey of the CHAPARRAL at request of Zapata.

(5) Sam Bryan of Shilston Testing Laboratories, metallurgist residing in Houston, Texas, who has participated in certain metallurgical testings of the damaged portions of the three legs of the CHAPARRAL.

(6) Several representatives of R. G. Le Tourneau, Inc., who will testify as to the damage repairs, the necessity therefor, and the reasonableness thereof, which were performed by R. G. Le Tourneau, Inc., at its facility in Vicksburg, Mississippi, and other places

on the Mississippi River. The three self-elevating legs of the CHAPARRAL were lost in the subject casualty of January 9, 1968, and Le Tourneau was engaged by Zapata to manufacture, assemble, and install replacements for these three legs. Le Tourneau built the CHAPARRAL and delivered it to Zapata in the Spring of 1966. Its designers and builders may be called to testify concerning the construction of the CHAPARRAL.

(7) Other witnesses whose testimony is only available in the United States pertaining to the damages sustained by Zapata are representatives of (a) Davis Transport, Inc., of Houston, Texas; (b) Bailey B. Line, Inc., of Metaire, La.; (c) Construction Services, Inc., of Houma, La.; (d) General Welding Supply Company of Tampa, Florida; (e) Pemco Welding, Inc. of Belle Chasse, La.; (f) Specific Offshore Equipment Company; (g) Gulf Mississippi Marine Corporation of New Orleans, La.; (h) Crescent River Pilots Assn. of New Orleans, La.; (i) Associated Branch Pilots of New Orleans, La.; (j) Statton & Statton Co., Inc. of Morgan City, La.; (k) Misener Marine Constructions, Inc., St. Petersburg, Florida; (l) Hendry Corporation of Tampa, Florida; (m) Pass-a-Grille Marina, Inc., of St. Pete Beach, Florida; (n) J. W. Appley & Son, Inc., of St. Petersburg, Florida; and (o) Wilson M. Hubbard Enterprises, Pass-a-Grille Beach, Florida. These persons and companies have furnished various services, equipment, and supplies in connection with repair of the damages sustained by Zapata. These witnesses will be called by Zapata to establish its damages.

(8) A. Holm-Andersen, marine surveyor and tug valuation expert, who may be called as a witness for Zapata as to the value of the Tug M/S BREMEN. He resides in New Jersey.

(9) Jack Mowbray of New York City, marine surveyor, who may be called as a witness for Zapata as to the value of the Tug M/S BREMEN.

(10) Zapata employed a Tampa photographer to take pictures of the damaged condition of the CHAPARRAL. He will be called as a witness.

VI. The following persons were employed by the defendant, Unterweser Reederei, following the filing of this suit, and they may be called by the defendant, or possibly by the plaintiff, in the trial of this case:

(1) Rush Johnson and J. R. Bencal, two marine surveyors, engaged by the defendant to survey the post-casualty damages to the CHAPARRAL. They reside in Houston, Texas.

(2) Representatives of Pittsburgh Testing Laboratories at Tampa, Florida, and Pittsburgh, Pa., engaged by the defendant to perform certain metallurgical tests on parts of the damaged legs of the CHAPARRAL. These testing experts reside in Tampa, Florida, and Pittsburgh, Pa.

(3) Defendant engaged Thomas A. Addison, surveyor, to survey the damaged towing gear of the M/S BREMEN. He resides in Tampa, Florida.

(4) Defendant employed a photographer to take photographs of the damaged condition of the CHAPARRAL.

VII. Plaintiff has heretofore taken 23 oral depositions de bene esse of the members of the crew of the defendant's Tug BREMEN and the German riding crew on the CHAPARRAL. Therefore, their evidence has been preserved and is available to the plaintiff or the defendant at the trial.

VIII. Defendant Unterweser Rederei has heretofore invoked the jurisdiction of this Court and has used this Court's processes in its preparations for trial.

(a) The records of this Court show that on February 16, 1968, defendant served on plaintiff "Notice of Taking Depositions" of Oscar D. Willard, Wilton Johnson, Oscar W. Paul, Nolan R. Gamble, Kenneth Price,

Billy C. Burke, Earl B. Richie and L. J. Fruge, in Tampa, Florida, beginning February 22, 1968. The notice provided that "said depositions will be taken for the purpose of discovery, for use at trial, and for such other purposes as are permitted under applicable statutes and rules of civil procedure." Said depositions were taken by defendant under such Notice beginning on February 22, and concluding on February 25, 1968. Plaintiff also took these witnesses' depositions under a Notice to Take Depositions de bene esse.

(b) The records of this Court further show that on March 15, 1968, defendant Unterweser Reederei served on plaintiff "Notice of Taking Depositions" of Noel Thompson and John Hellendoorn in New Orleans, Louisiana, commencing on April 9, 1968. Based on such Notice, defendant had issued by the United States District Court at New Orleans subpoenas duces tecum, which were served upon Noel Thompson and John Hellendoorn. These depositions were noticed by defendant for the "purpose of discovery" under the Federal Rules of Civil Procedure. The depositions of Noel Thompson and John Hellendoorn were taken by defendant under said Notice, commencing on April 9 and concluding on April 12, 1968. Plaintiff also took these witnesses' depositions under an amended Notice of Taking Depositions under the Federal Rules of Civil Procedure for use as evidence in this suit.

(c) Further, defendant filed in this Court on February 27, 1968, a Motion for Production of Documents, calling for the production of 33 items, consisting of documents, reports, plans, instructions, etc. This motion is pending.

IX The attorneys for Zapata, Dewey R. Villareal, Jr., of Tampa, Florida, and James K. Nance of Houston, Texas, have devoted an enormous amount of time in investigating the casualty involved in this suit, interviewing numerous lay witnesses, engaging and consulting with experts, preparing of pleadings, motions, three appearances heretofore made in this Court to argue various motions, the taking of thirty-three oral depositions, researching the law, and preparing and filing memoran-

dum briefs. Attorneys for plaintiff have collectively spent over seventy-five days in connection with the foregoing. In addition, Zapata has heretofore incurred over $12,500 (not counting attorneys' fees) for deposition costs, interpreters' fees, witnesses expenses, photostating of documents, investigating expense, and travel and lodging costs.

If Zapata is relegated to a foreign forum, it would have to engage foreign counsel to prepare the case for trial, and substantial additional unnecessary expense would be incurred by Zapata. It would be inequitable to Zapata to require it at this stage to turn over its claim against Unterweser Reederei to foreign counsel for prosecution in a foreign country who has not participated heretofore in this matter.

X. The subject matter of this litigation has numerous contacts with the United States:

(1) Zapata Off-Shore Company is domiciled and does business in the United States, including the States of Texas, Louisiana and others.

(2) The CHAPARRAL is a United States vessel, solely owned by Zapata.

(3) The performance of the contract of towage in the United States by defendant consisted, among others, of the following things: Captain Otto Litwinski, Port Captain and Superintendent of defendant's Tug Department, in December, 1967, went to Louisiana to inspect the CHAPARRAL where it was located at a point below Venice, La., in the Mississippi River, to make towing plans for the voyage in question. The master, the first officer and other members of the crew of the BREMEN boarded the CHAPARRAL prior to the departure on January 5, 1968, for inspections and for making towing arrangements. The BREMEN commenced towing the CHAPARRAL from the point below Venice, Louisiana, above mentioned on the afternoon of January 5, 1968. The CHAPARRAL was towed down the Mississippi River to the Gulf of

Mexico. The casualty occurred in the Gulf of Mexico in International waters on January 9, 1968. Further performance of the towage contract terminated on the arrival of the CHAPARRAL in tow of the BREMEN at Egmont Key Anchorage, Tampa, Florida, on January 12, 1968. Shortly thereafter, a joint survey was held on board the CHAPARRAL to inspect and determine its damaged condition.

(4) Under the contract of towage, plaintiff was obligated to make payment for tug hire to Chase Manhatten Bank, New York City, in favor of defendant.

(5) Under the contract of towage, plaintiff was obligated to make payment for the services of the Louisiana pilot that piloted the BREMEN as it towed the CHAPARRAL down the Mississippi River to the Gulf of Mexico. Plaintiff paid the fee for such pilot services.

(6) Under the contract, plaintiff was required to engage a competent and approved surveyor to survey the condition of the CHAPARRAL prior to departure. Plaintiff engaged the services of Salvage Association, London, at New Orleans, and its surveyors conducted such survey and thereafter on January 5, 1968, issued a certificate for the voyage (Limited "to the Florida Straights"). Such services were performed on the CHAPARRAL while on the Mississippi River in Louisiana prior to the BREMEN'S departure on January 5, 1968, towing the CHAPARRAL.

(7) Zapata prepared the CHAPARRAL for tow in the United States.

(8) As set forth above, there are over forty witnesses residing in the United States who have knowledge concerning the issues of liability, damages, or the value of the Tug BREMEN, and who may be called by either the plaintiff or defendant.

XI. Attached hereto is affidavit of Hoyt Taylor, Vice President of plaintiff, regarding the negotiations and execution of the contract of towage, which controverts

in several respects the affidavit of Erich von Aswegen, Managing director of Defendant, pertaining to said contract.

The foregoing constitutes the factual basis for plaintiff's opposition to defendant's motions requesting this Court to dismiss and to decline jurisdiction.

* * *

Respectfully submitted,
BAKER, BOTTS, SHEPHERD & COATES
By *James K. Nance*
JAMES K. NANCE
1600 Esperson Building,
Houston, Texas 77002
FOWLER, WHITE, COLLINS, GILLEN,
HUMKEY & TRENAM
By *Dewey R. Villareal, Jr.*
DEWEY R. VILLEREAL, JR.
P. O. Box 1438
Tampa, Florida 33601
Attorneys for Plaintiff

THE STATE OF TEXAS §
COUNTY OF HARRIS §

JAMES K. NANCE, being by me first duly sworn, deposes and says he is a member of the firm of Baker, Botts, Shepherd & Coates, attorneys for plaintiff, and that he has read the above and foregoing Amended Memorandum in opposition to Defendant's Motion to Dismiss on the Ground of Lack of Jurisdiction and Motion to Decline Jurisdiction. The statements set forth on pages 1-8 of said Amended Memorandum are true to the best of his knowledge, information and belief.

James K. Nance
James K. Nance

SUBSCRIBED TO AND SWORN BEFORE ME, this 19th day of April, 1968.

Joyce O'Neill
Notary Public in and for Harris County, Texas

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ZAPATA OFF-SHORE COMPANY,

Plaintiff,

V.

M/S BREMEN AND UNTERWESER REEDEREI, GMBH,

Defendants

NO. 68-21-Civ-T

FILED
TAMPA, FLA.
APR 22 1968
WESLEY R. THIES
CLERK

AFFIDAVIT OF CARL R. APTHORP, SECRETARY OF ZAPATA OFF-SHORE COMPANY, PLAINTIFF

THE STATE OF TEXAS |
COUNTY OF HARRIS |

BEFORE ME, the undersigned authority, personally appeared Carl R. Apthorp, who, being by me duly sworn, deposes and says:

1. My name is Carl R. Apthorp. I reside in Houston, Texas. I am an officer of Zapata Off-Shore Company, its duly elected Secretary, and have served in such capacity since February 1, 1967.

2. In my capacity as Secretary, I have custody of the corporate records of Zapata Off-Shore Company pertaining to its incorporation and corporate existence. Zapata Off-Shore Company filed its Certificate of Incorporation with the Secretary of State of the State of Delaware on October 25, 1954, and was duly incorporated on said date. Zapata Off-Shore Company has continued to be incorporated under the laws of the State of Delaware from said date to the present time. It is in good standing and has a legal corporate existence, as evidenced by the annexed Certificate of Good Standing issued by the Secretary of State of the State of Delaware on March 11, 1968.

3. Zapata Off-Shore Company's principal office

and place of business is located in Houston, Texas.

4. Zapata Off-Shore Company does not have a license or permit to do business in the United Kingdom, including England. It does not have or maintain an office or place of business in the United Kingdom.

5. As Secretary, I am in charge and have custody of the documentation records pertaining to the Drill Barge (rig) CHAPARRAL, which was damaged on January 9, 1968, while in tow of defendant's tug M/S BREMEN. The CHAPARRAL was purchased by Zapata Off-Shore Company on or about March 24, 1966. It was, and still is, documented and registered under the laws of the United States. Its official number is 504200. It is presently registered at the Port of Houston, Texas. A duly certified copy of Certificate of Registry, issued on January 2, 1968, and duly attested as a true copy on February 27, 1968, is annexed hereto.

Zapata Off-Shore Company has been the sole owner of the CHAPARRAL since March 24, 1966, and still is.

6. As Secretary of Zapata Off-Shore Company, I have personal knowledge of the persons who have been and are serving as its officers and as members of its Board of Directors.

The following persons, residents of the States of Texas, Louisiana, or New York, and citizens of the United States, constituted the Board of Directors of Zapata Off-Shore Company as of January 8, 1968:

D. Doyle Mize,
Chairman of the Board,
Houston, Texas.

William H. Flynn,
President,
Houston, Texas.

Robert H. Gow,
Executive Vice-President
and Treasurer,
Houston, Texas.

Jimmie C. Garner,
Port Arthur, Texas.

William H. Henderson,
New Orleans, Louisiana.

Alvin H. Howard
New Orleans, Louisiana.

Sam Israel, Jr.,
New Orleans, Louisiana.

B. John Mackin,
Houston, Texas.

Michael M. Thomas,
New York City, New York.

These same persons continue presently to serve as Directors, with the exception of Mr. William H. Henderson, who has resigned effective March 2, 1968.

The following persons, residents of the State of Texas, and citizens of the United States, hold positions as officers with Zapata Off-Shore Company indicated below:

C. R. Apthorp,
Secretary,
Houston, Texas.

W. T. Adams,
Vice-President,
Houston, Texas.

E. F. Shiels,
Senior Vice-President,
Houston, Texas.

Hugh Robertson,
Controller,
Houston, Texas.

Hoyt Taylor,
Vice-President,
Houston, Texas.

7. I have personal knowledge of the distribution of the common stock of Zapata Off-Shore Company. As of January 15, 1968, there were 3,110,144 total shares of common stock outstanding. Of such total, 3,040,614 shares were held by shareholders residing in the United States and the remaining balance of 69,530 shares were held by shareholders outside the United States. Approximately 97.7% of the shareholders of the common stock of Zapata Off-Shore Company, resided in the United States as of January 15, 1968.

Carl R. Apthorp

SWORN TO AND SUBSCRIBED BEFORE ME this 18th day of April, 1968.

Jerry McLennan
Notary Public in and for Harris County, Texas

My Commission expires June 1, 1969.

PERMANENT
No. 21

THE UNITED STATES OF AMERICA

BUREAU OF CUSTOMS

DEPARTMENT OF TRANSPORTATION
United States Coast Guard

504200

Issued New Orleans, La. 1966
Adjusted at
Renewed

Service Oil Exploitation
Navigation

Certificate of Registry

IN PURSUANCE OF CHAPTER ONE, TITLE XLVIII

"REGULATION OF COMMERCE AND NAVIGATION," REVISED STATUTES OF THE UNITED STATES

(CHAPTER 1, TITLE 46, "SHIPPING," CODE OF LAWS OF THE UNITED STATES)

Carl R. Apthorp, of 11322 Conifer Road, Houston, Texas 77024, Secretary.

having taken and subscribed the oath required by law, and having sworn that

ZAPATA OFF-SHORE COMPANY (74-1339152)
2000 Southwest Tower Bldg.
Houston, Texas 77002

Incorporated under the laws of the State of Delaware

is a citizen of the United States and the sole owner of the vessel called the

CHAPARRAL of Houston, Texas
(Name of vessel) (Home port)

whereof Oscar D. Villard is at present master, and is a citizen of the United States, and that the said vessel was built in the year 1966 at Vicksburg, Mississippi of steel as appears by P.E. No. 133 issued at Houston, Texas on March 24, 1967.

And said Enrollment

the said vessel is a Barge, One Derrick and No mast, having square stern, and a square stern; that her register length is 167.4 feet, her register breadth 180.1 feet, her register depth 22.7 feet, her height feet, that the measures as follows:

	Tons	Hundredths
Capacity under tonnage deck,	4278	86
Capacity between decks above tonnage deck,		
Capacity of enclosures on the upper deck, viz: Forecastle, midship, poop, break house 8645 644.61 cubic feet 74997 on 0/0 16.13 deck allowance, light and air,	481	09
Gross tonnage,	4759	95

Deductions under Section 4588, Revised Statutes, as amended (Section 77, Title 46, United States Code):

Crew space, Master's cabin,
Steering gear, Anchor gear, Boatswain's stores,
Chart house, Donkey engine and boiler, Radiohouse,
Storage of sails, Propelling power (actual space).

Total deductions,

Net tonnage,	4759

The following-described spaces, and no others, having been omitted, viz: Forepeak, afterpeak, other spaces (except double bottoms) for water ballast, upon forecastle, upon bridge, upon poop, upon shelter deck, upon houses, as follows, dimensions 5.93 by 24.35 by 8.61, wheelhouse, water closets 48.18, another gear, donkey engine and boiler, steering gear, light and air over propelling machinery, other machinery spaces 15.17

And

having agreed to the description and measurements above specified, the vessel has been duly REGISTERED at this PORT;

GIVEN under my hand and seal at the PORT of Houston, Texas

this 2nd day of January

the year One Thousand Nine Hundred and sixty-eight.

Seal of Customs

Norman C. Voss, Marine Officer,
By direction: Chief, Documentation

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ZAPATA OFF-SHORE COMPANY,

Plaintiff,

V.

M/S BREMEN AND UNTERWESER REEDEREI, GMBH,

Defendants

NO. 68-21-Civ-T

AFFIDAVIT OF HOYT TAYLOR, VICE PRESIDENT OF ZAPATA OFF-SHORE COMPANY

THE STATE OF TEXAS |

COUNTY OF HARRIS |

BEFORE ME, the undersigned authority, personally appeared Hoyt Taylor, who, being by me duly sworn, deposes and says:

1. That he is a Vice President of Zapata Off-Shore Company, a corporation organized and existing under the laws of the State of Delaware. Said corporation is the plaintiff in the above styled and numbered cause.

2. That affiant, in his capacity as Vice President, has personal knowledge respecting the negotiations for and the execution of that certain towage contract entered into by Zapata Off-Shore Company and Unterweser Reederi GMBH, defendant in the above styled and numbered cause, under which said defendant agreed to tow the Drilling Rig CHAPARRAL from Venice, Louisiana, to a point near Ravenna, Italy. Said contract is referred to in the affidavit of Erich von Aswegen on file herein and is annexed to said affidavit and marked Exhibit No. 1.

3. Affiant says that in October, 1967, he, acting for Zapata Off-Shore Company, requested several tug companies, including defendant Unterweser Reederei, to submit bids to

Zapata's home office in Houston, Texas, on the proposed towage of the CHAPARRAL from Venice, Louisiana, to a point near Ravenna, Italy. Defendant submitted to Zapata at its Houston office a bid of $1900 daily hire, plus $85,000 mobilization fee, and runner crew to be furnished at $30 per man per day. Zapata Off-Shore Company accepted this bid in Houston, Texas, subject to finalizing a written contract for this tow.

4. In his affidavit, Mr. Von Aswegen states:

> "4. That the provision contained in said contract, identified as Paragraph No. 8 under 'General Towage Conditions,' which reads as follows:
>
> '8. Any dispute arising must be treated before the London Court of Justice,'
>
> was considered by UNTERWESER REEDEREI GMBH to be of overriding importance. As set forth in the towage contract (clause 15 thereof), the General Towage Conditions, including specifically clause 8 thereof hereinbefore quoted, were to be considered an 'integral part' of the towage contract. Ordinarily, UNTERWESER REEDEREI GMBH towage contracts provide for exclusive German jurisdiction and for the application of German law. In this instance, in an effort to meet ZAPATA OFF-SHORE COMPANY half way, UNTERWESER REEDEREI GMBH proposed the London Court of Justice. Had this provision not been accepted by ZAPATA OFF-SHORE COMPANY, UNTERWESER REEDEREI GMBH would not have entered into the towage contract, said provision being considered fundamental to the agreement."

The facts are that after Zapata accepted Unterweser Reederei's bid above mentioned, the contract of towage was drafted by Unterweser Reederei and mailed by it from Bremen, Germany, to Zapata in Houston, Texas. Said draft included Paragraph 8, reading "Any dispute arising must be treated before the London Court of Justice." Before and after such draft was tendered to Zapata for acceptance, there were no discussions between Zapata and Unterweser Reederei whatever concerning Paragraph 8.

Said contract does not provide that "the London

Court of Justice" is the "exclusive" court of jurisdiction. In said contract, Zapata did not specifically agree not to file this suit against the Tug M/S BREMEN and Unterweser Reederei in this United States District Court.

5. In Paragraph 5(f) of his affidavit, Mr. Von Aswegen says:

> "(f) That in agreeing upon the designation of the London Court of Justice as the forum to which any dispute arising under the aforesaid towage contract would be submitted, the parties intended that the controlling law to be applied would be the law of the forum, i.e., English law."

Affiant denies Mr. Von Aswegen's statement that "the parties intended that the controlling law to be applied would be the law of the forum, i.e., English law." At no time did affiant and Unterweser Reederei discuss or mention what law was "intended" to control in the event of litigation.

Hoyt Taylor, Vice President,
Zapata Off-Shore Company

SWORN TO AND SUBSCRIBED BEFORE ME, this 18th day of April, 1968.

Daphne B. Ashley
Notary Public in and for Harris County, Texas

My Commission expires June 1, 1969.

DAPHNE B. ASHLEY
NOTARY PUBLIC IN AND FOR HARRIS COUNTY, TEXAS
MY COMMISSION EXPIRES JUNE 1, 1969

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ZAPATA OFF-SHORE COMPANY,

Plaintiff,

V.

M/S BREMEN AND UNTERWESER REEDEREI, GMBH,

Defendants.

NO. 68-21-Civ-T

FILED
TAMPA, FLA.
APR 22 1968
WESLEY R. THIES
CLERK

AFFIDAVIT

BEFORE ME, the undersigned authority, personally appeared Fergus Dingwall Bateson, who, being by me first duly sworn, deposes and says:

1. My name is Fergus Dingwall Bateson. I am a partner in the law firm of Thomas Cooper & Co., Solicitors of Baltic House, 27 Leadenhall Street, London, England. I hold a Degree in Litterae Humaniores at the University of Oxford.

2. My legal education consisted of two courses of study at the School of Law of the Law Society, culminating in my passing the final examinations of the Law Society with Honours. The Law Society is the only body authorised to set qualifying examinations for Solicitors in England. I was admitted to practise as a Solicitor in the courts of England on 2nd July 1956, and am duly licensed to practise as such at this time. I am a specialist in the practice of English Maritime and Admiralty Law, and have practiced in this field of law for about twelve years past.

3. I have been requested by Mr. James K. Nance, partner in the law firm of Baker, Botts, Shepherd and Coates, Houston, Texas, to submit an opinion, under the

English Law, concerning the validity of certain provisions of towage contract entered into between Unterweser Reederei GMBH, Bremen, Germany, and Zapata Off-Shore Company, Houston, Texas, relating to the towing of the Drill Barge CHAPARRAL from Venice, Louisiana, to a point near Ravenna, Italy. A copy of the said contract is annexed to this affidavit and marked for identification "F.D.B.1." The provisions in question are described as "General Towage Conditions", clauses 1, 2, 3 and 4, and read as follows:

1.(omissis) "Urag, their masters and crews are not responsible for defaults and/or errors in the navigation of the tow".

(According to said contract of towage, "Urag" refers to "Unterweser Reederei GMBH).

2.(a) For damages suffered by the tug the Owners of the towed object are responsible unless they prove that those damages are caused by default of the tug.

For loss or damages which the tug suffers through her own fault by collision with third parties the tug shall only be responsible in so far as such loss or damages are not occasioned or contributed to by the towed object.

(b) Damages suffered by the towed object are in any case for account of its Owners.

(c) Damages caused to third parties by the tug and/or the towed object are to be made good by the Owners of the towed object. This does not apply if they prove that damages are caused entirely by default of the tug.

3. The Owners of the tug cannot be held liable if for unforeseen reasons the voyage cannot be started at all, if the commencement of the voyage is delayed or if any stay and/or delay occur during the voyage. The Owners of the tug are particularly not liable for breaking or slipping of tow ropes and/or towing gear, premature shortage of bunkers on account of bad weather, delay, damages or loss due to the Act of God, Force Majeure, perils of the Sea, strikes, lock-outs, labour troubles, enemies, hostilities, war, epidemic, quarantine, embargo, restraint of any government, rulers or people, salvage operations or any other kind of assistance.

4. As far as the liability of the tug is excluded or has been taken over by the Owners of the towed object, the latter are also under obligation of keeping the tug Owners indemnified for all claims of third parties or to indemnify them for any claim already realised by them. This also applies if the Owners of the towed object call on third parties and the latter try to recover against the tug Owners. The Owners of the object have the same obligation towards employees and agents of the tug Owners. Furthermore they are obligated not to sue the employees and agents themselves.

4. According to information furnished me by Mr. James K. Nance, one of Zapata Off-Shore Company's attorneys, the Drill Barge CHAPARRAL sustained a casualty on January 9, 1968, while under tow of the Tug M/S BREMEN, owned by Unterweser Reederei GMBH.

5. It is my opinion that the above quoted exculpatory clauses, under English law, are not against the public policy of England, and would be held to be prima facie valid and enforceable by an English Court should a cause of action be filed in England either by way of original Action or by way of counterclaim by Zapata Off-Shore Company against Unterweser Reederei GMBH to recover damages sustained by the CHAPARRAL, and in which said cause of action Zapata Off-Shore Company alleged that "defaults and/or errors in the navigation of the tow" on the part of Unterweser Reederei and the master and crew of the Tug M/S BREMEN caused the casualty and resulting damage to Zapata.

6. The question whether exculpatory clauses in a towage contract could be contrary to public policy was considered by Mr. Justice Hill in The "PRESIDENT VAN BUREN" (1925) 132 Law Times Reports p.253, a copy of whose Judgment is annexed to this affidavit and marked for identification "P.D.B.2".

It will be seen that the exculpatory clause under consideration in that case was more stringent than the nexus of exculpatory provisions in the present contract in that the Tugowners were not only exonerated from liability for damage caused to the vessel towed, but were also entitled to be indemnified in respect of claims by third parties, and to an indemnity in respect of damage caused to the tug, in each case even though the damage was occasioned by negligence of the Tugowners servants : furthermore the Tugowners, who were the Port of London Authority, were in a monopoly position.

The above cited Judgment of Mr.Justice Hill stands up to the present day as the leading, indeed so far as I know the only, authority on this subject in English Law.

GREAT BRITAIN AND NORTHERN IRELAND)
LONDON, ENGLAND) ss:
EMBASSY OF THE UNITED STATES OF AMERICA)

I, Frank J. Barrett Vice Consul of the United States of America residing at London, England, duly commissioned and qualified, do hereby certify that

ANT. J. BURGESS

whose signature and official seal are respectively subscribed and affixed to the annexed certificate, was on the date of the signing thereof of a Notary Public at London, England, duly authorized to perform notarial acts, duly appointed and qualified, to whose official acts faith and credit are due; that I have compared the signature of said

ANT. J. BURGESS

of the annexed certificate with a specimen of his signature filed in this Embassy; that I believe his signature to be genuine; that I have compared the impression of the seal affixed thereto with a specimen thereof filed in this Embassy, and that I believe the impression of the seal upon the said original annexed certificate to be genuine.

In witness whereof I have hereunto set my hand and affixed the seal of the Consular Service of the United States of America at London, England, this tenth day of April in the year of Our Lord one thousand nine hundred and sixty-eight.

Frank J. Barrett
Vice Consul of the United States of America at London, England.

Service Receipt No. A2@43894

Tariff Item No. 48

Fee: $2.50 - 21s. 0d.

~~No fee prescribed.~~

LND/114
Jan.1968

7. It is, of course, open to a superior Court to overrule the decision of Mr. Justice Hill in The "PRESIDENT VAN BUREN" cited above, or to limit its scope, but this is in my opinion very unlikely to occur having regard to the general approach of the English Courts to freedom of contract, of which Mr. Justice Hill's Judgment is a fair example.

With this qualification, I am in no doubt that the exculpatory clauses contained in the contract, copy of which is annexed to this affidavit and marked "F.D.B.1", and specifically the clauses quoted in paragraph 3 above, would be held by the English Courts not to be against the public policy of England and would on the contrary be upheld as prima facie valid and enforceable against Zapata Off-Shore Company should a cause of action be filed by said Company in England, either by way of original Award or by way of counterclaim, against Unterweser Reederei GMBH arising out of the casualty referred to in paragraph 4 above.

8. I have prepared this affidavit to the best of my art and skill and conscientiously believe the same to be true.

F. D. Bateson

F.D.Bateson.

SWORN TO AND SUBSCRIBED before me this tenth day of April, 1968.

A. J. Burgess

Notary Public in and for the City of London and elsewhere in England

(A. J. BURGESS)

" F.D.B.1."

THIS IS THE EXHIBIT MARKED "F.D.B.1"
REFERRED TO IN THE AFFIDAVIT OF
FERGUS DINGWALL BATESON, SWORN TO THIS
10th DAY OF APRIL 1968 BEFORE ME:
NOTARY PUBLIC
LONDON, ENGLAND
(A. J. BURGESS)

TOWAGE CONTRACT

(Daily Hire)

It is this day mutually agreed between

ZAPATA OFF-SHORE COMPANY, HOUSTON/TEXAS (hereinafter called "Owners")

and

UNTERWESER REEDEREI GMBH, BREMEN (hereinafter called "URAG"),

Owners of the ocean-going tug "BREMEN",

that the latter shall tow the Drill Barge "CHAPARRAL" (hereinafter called "Object")

Dimensions:	
length of barge hull	180'
overall length	205'
overall width of barge	205'
overall leg length	435'
hull draft	approx. 12'3"
legs' draft	approx. 50'

from Venice (Louisiana)

to a point near Ravenna (Italy), as destined by "Owners".

1. a) Price

The "Owners" shall pay for such operation the sum of US$ 35.000,--
(say thirtyfivethousand US-Dollars)
and a daily hire rate of US$ 1.900,-- (say nineteenhundred US-Dollars)
for all time used by the tug counting from time of arrival at port of departure of the tow (Venice/La.) - not earlier than December 1st, 1967 - until delivery of the "object" at Ravenna.

b) Conditions of Payment

US$35,000 - on arrival of the tug at Venice, Louisiana.

157

Daily hire to be paid in instalments of 14 days in advance; first instalment being due and payable before the tow leaves Venice/La. Balance, if any, to be settled on delivery of the "object" at destination.

All payments to be made to Chase Manhattan Bank, New York, in favour of URAG.

EXHIBIT 1

2. Port Charges and Expenses

a) "Owners" to pay all costs for making the object ready for towing and expenses incurred by the tug and object - hereinafter called "the tow" - on leaving port of departure, at refueling ports "en route", and at arrival at port of destination as port charges, harbour dues, pilot charges, agency fees, Canal tolls, any non-German dues and stamp fees being assessed or levied on the towage price or otherwise arising out of this Agreement and/or service of assisting tugs, where necessary in the tug master's discretion or prescribed by Port Authorities.

b) Customs and/or export/import dues as well as insurance of the "object" shall be for account of the "Owners".

c) URAG shall pay all port charges, harbour dues, pilot charges, agency fees, Canal tolls and other expenses upon or in connection with the tug on arrival at the port of departure of the "tow and upon sailing from point of destination of the "tow" after delivery of the "object".

3. Towing Gear and Runner Crew

URAG to provide towing hawsers, bridles and other towing gear as deemed necessary for the towage service by URAG or their tug master.

URAG to provide a runner crew for the "object", consisting of one Marine Superintendent and 2 seamen. The crew shall be provided at the "Owners'" expense with suitable accommodation, freshwater tanks, life saving appliances and all other requisites, in accordance with the requirements and conditions of the Marine Authorities of the countries concerned; provided, however, that URAG shall be solely responsible for the riding crew at all times.
"Owners" to pay URAG US$ 30,-- per man and per day, counting from the departure from Bremerhaven until arrival at Ravenna. Payment to be effected together with daily hire instalments as per clause 1 b).

4. Seaworthiness

"Owners" to have the "object" in a seaworthy condition for the proposed towage and an approved certificate to such effect issued by a competent and approved surveyor, is to be provided by the "Owners" to URAG or their master on arrival of the tug at port of departure, failing which "Owners" to pay URAG daily hire rate as per clause 1 for the delay involved.

If the towage cannot be started at all, due to "Owners'" inability to obtain the Certificate of Seaworthiness, "Owners" to pay URAG - besides the amount of US$ 35.000,-- (mobilization fee) - the daily hire rate of US$ 1.900,-- for the ballast homeward voyage of the tug to Bremerhaven. If the tug does not return directly to Bremerhaven, time for the return voyage shall be computed on the basis of the tug's normal running time to her port of destination by the customary route.

5. Port of Departure

The "object" shall be delivered to the tug at a place which the tug can safely approach and where she can safely lie always afloat and from where she is permitted to commence towage of the "object" in accordance with local regulations.

The decision of the tugmaster as to the suitability and fitness of any proposed place of delivery to be accepted by the "Owners" as conclusive.

6. Port of Destination

The "object" shall be taken over by the "Owners" or their authorized representative at a place which the "tow" can safely approach and where it can safely lie and manoeuvre, always afloat, and is permitted to go in accordance with local regulations.

7. No Salvage

In the event of the "object" breaking away from the tug during the course of this towage service, the tug shall stand by and render all reasonable service in reconnecting the towline without making any claim for salvage, unless circumstances arise beyond actual contemplation of the towage services.

8. Necessary Deviation

If the tow during the course of the towage puts into a port on account of unseaworthiness of the "object" or because of any other reason not being the fault of the tug, all costs including those for the tug shall be for account of the "Owners". Payment of daily hire as per clause 1 to be continued for all time involved in this deviation.

9. Lien for Towing Charges

URAG shall have an absolute lien on the "object" for the full towing charge and/or all additional compensations due to them under this Agreement including cost of recovery of same.

10. Liberties

The tug may at any time during execution of this contract go to the assistance of vessels in distress - unless such action would put the object under towage in distress - for the purpose of saving life or property, call at any port for fuel, repairs, supplies or other necessaries, or to land disabled seamen. Time spent by the tug under such circumstances shall be considered "off hire".

11. Penalties

URAG shall not be responsible for any consequences arising from the act or error of the "Owners" in connection with export or entry declarations in respect of the tow, and any penalty incurred by URAG or by the tug, her master, officers and crew by reason of such act or default of the "Owners" shall be reimbursed by the "Owners" to URAG in full and any delay caused to be compensated at the rate of daily hire as per clause 1 of this Agreement.

12. Claim and Suit

URAG and the tug, her owners, operators, managers agents, or charterers shall be discharged from liability unless any claim for loss, damage or delay is made in writing within fourteen (14) days from the date of arrival of the tow at destination, or termination of the tow for any reason whatsoever, and action at law or suit in Admiralty is brought to recover thereon within one (1) year after said loss or damage is claimed to have been sustained.

13. War Clause

In case of war, warlike events, restraints of rulers or similar events effecting shipping, URAG is entitled to abstain from the towage contract or from part of it, not yet executed. In this case "Owners" of the "object" acquire no claims against URAG.

14. All type-written inserts to be considered as part of this contract. Supplements and/or deletions valid only if initialed by both parties.

15. "General Towage Conditions" to be considered as integral part of this towage contract.

GENERAL TOWAGE CONDITIONS

1. For the execution of the towage contract it is agreed that the tug represents only the motive power of the towed object.

URAG, their masters and crews are not responsible for defaults and/or errors in the navigation of the tow.

2. a) For damages suffered by the tug the Owners of the towed object are responsible unless they prove that those damages are caused by default of the tug.

For loss or damages which the tug suffers through her own fault by collision with third parties the tug shall only be responsible in so far as such loss or damages are not occasioned or contributed to by the towed object.

b) Damages suffered by the towed object are in any case for account of its Owners.

c) Damages caused to third parties by the tug and/or the towed object are to be made good by the Owners of the towed object. This does not apply if they prove that damages are caused entirely by default of the tug.

3. The owners of the tug cannot be held liable if for unforeseen reasons the voyage cannot be started at all, if the commencement of the voyage is delayed or if any stay and/or delay occur during the voyage. The owners of the tug are particularly not liable for breaking or slipping of tow ropes and/or towing gear, premature shortage of bunkers on account of bad weather, delay, damages or loss due to the Act of God, Force Majeure, perils of the Sea, strikes, lock-outs, labour troubles, enemies, hostilities, war, epidemic, quarantine, embargo, restraint of any government, rulers or people, salvage operations or any other kind of assistance.

4. As far as the liability of the tug is excluded or has been taken over by the owners of the towed object, the latter are also under obligation of keeping the tug owners indemnified for all claims of third parties or to indemnify them for any claim already realized by them. This also applies if the owners of the towed object call on third parties and the latter try to recover against the tug owners.

The Owners of the object have the same obligation towards employees and agents of the tug owners.

Furthermore they are obligated not to sue the employees and agents themselves.

5. The towage rates agreed do not include any special performance of the tug such as assistance for stranded vessels or for vessels in distress, especially not included is remuneration for salvage even in case that stranding, other distress or salvage case occurred in the course of the towage, except as provided by clause 7 of towage contract.

6. If and in so far one of the aforementioned clauses should be declared null and void totally or partially, nevertheless the other clauses or the rest of the clause in question remain in force.

7. For the towage contract and its general conditions the following words are defined:

a) "tug" = tugs owned or operated by the tug owners including crews.

b) "towed objects" = objects of the contract including crews, regardless of being provided by the Owners of the object or the tug owners.

c) "damage" = damage to property or persons.

d) "third parties" = property and persons beyond the limits of the towage contract.

e) "employees" = all persons of the tug owners entered into service-contracts with them.

f) "agents" = third firms and persons, engaged by the tug owners without service-contracts for the performance of the towage contract.

g) "towage contract" = contract covering all kinds of moving and assisting of objects.

h) "Owners of the towed object = contract partner of the tug owners.

8. Any dispute arising must be treated before the London Court of Justice.

Bremen, November 3, 1967

UNTERWESER REEDEREI
G.m.b.H.

ZAPATA
OFF-SHORE COMPANY

subject to the special case, damages to the charterers based on the difference between the value of the cargo if put on board and delivered at Cardiff and its value unshipped.

The special case came before Bailhache, J., who found that the owners had committed a breach of contract by making the statement they did, and that the damages, found by the umpire, were the direct result of that breach of contract. Complaint is made of this finding on the ground, as I understand it, that the damages were really too remote and could not have been within the contemplation of the parties; and, again as I understand it, that argument is founded on the fact that there is inserted in the charter-party, in addition to the statement as to the estimated date when the vessel would be due to load, a cancelling date; and Mr. Somervell's contention is that where you find a cancelling date it is not within the contemplation of the parties that the damages, which are now claimed, should be claimable.

The answer to that, it seems to me, is that there are two contracts—one in reference to the date when the vessel was due to load, and the other in reference to the cancelling date, and that the parties must have contemplated payment of damages which directly flowed from a breach of either contract. If you find, as here, that these particular damages flowed directly from the breach of contract in reference to the due date, it seems to me that there is ample authority for saying that Bailhache, J., was right in holding, upon the umpire's findings, that the charters were entitled to succeed. Mr. Somervell has cited to us the case of Hobbs v. London & South-Western Rly. Co. L.R. 10 Q.B. 111, but I would remind him that Cockburn, C.J., at p. 117, said:—

> Therefore you must have something immediately flowing out of the breach of contract complained of, something immediately connected with it, and not merely connected with it through a series of causes intervening between the immediate consequence of the breach of contract and the damage or injury complained of.

On the facts found in the present case there was no series of causes intervening, but there was merely the direct consequence.

In these circumstances the appeal fails and must be dismissed with costs.

Lord Justice Scrutton and Lord Justice Atkin concurred.

ADMIRALTY DIVISION.

Tuesday, June 17, 1924.

THE "PRESIDENT VAN BUREN."

Before Mr. Justice Hill.

Tug and tow—Loss of port authority's tug by collision with tow—Towage agreement indemnifying tug owners against all claims—Tug owners' negligence of available tugs—Whether towage agreement void as against public policy.

This case came on for trial on two preliminary questions of law. The suit involved a claim and counterclaim for damages arising out of a collision between the Port of London Authority's steam tug *Sirdar* and the United States Shipping Board's steamship *President van Buren* (then known as the *Old North State*), in Tilbury Main Dock, on Apr. 24, 1922. At the time the *Sirdar* was acting as one of the tugs engaged in the work of towing the *President van Buren* to the Shipping Board's appropriate berth in the dock. The plaintiffs, by their statement of claim, alleged that the collision (which was between the steamship propeller and the tug's starboard side) which resulted in the sinking of the tug was solely caused by the negligent and improper navigation of the *President van Buren*. The defendants, on the other hand, attributed the collision solely to the negligent navigation of the *Sirdar* "by the plaintiffs or their servants."

The plaintiffs, in reply, pleaded that at all material times, the *President van Buren* was being transported and the services of the *Sirdar* were supplied under an agreement, dated Apr. 24, 1922, addressed to the plaintiffs' superintendent and signed by E. Shard on behalf of Mozon, Salt & Co. Ltd., as agents for the defendants.

The agreement provided *inter alia* that:—

> The masters and crew of the tugs at all transport men shall cease to be under the control of the Port Authority during and for all purposes connected with the towage or transport, and shall become subject in all things to the orders and control of the master or persons in charge of the vessel or craft towed or transported and are the servants of the owner or owners thereof, who hereby undertake to pay for any damage caused to any of the Port Authority's property or persons and to bear, satisfy and indemnify the Port Authority against liability for all claims for loss of life or injury to persons or loss or damage by collision or otherwise to the vessel or to or by the vessel or craft towed or to or by any cargo or other thing on board the same, or to or by any vessel, cargo or property of any other person or persons, or to the tug or tugs supplied, whether such damage, loss or injury arise or be occasioned by any accident or by any omission, breach

---

THIS IS THE EXHIBIT MARKED "F.D.B.2"

REFERRED TO IN THE AFFIDAVIT OF

FERGUS DINGWALL BATESON. SWORN TO
THIS 10th DAY OF APRIL, 1968
BEFORE ME :

A. J. Burgess.

NOTARY PUBLIC
LONDON, ENGLAND
(A. J. BURGESS)

of duty, mismanagement, negligence or default of any of such masters, crew or men, or any servant of the authority or any other person, or from or by any defect or imperfection in the tug or tugs supplied, or the machinery or ropes or tackle, or any other part of them, or any delay, stoppage or slackness of the speed of the same, however occasioned, or for what purpose or wheresoever taking place or by any other cause of any kind arising out of or directly or indirectly connected with the towage or transport.

On the application of the defendants, an order was made that two preliminary questions should be tried before the facts relating to the collision were gone into, namely (1) whether the agreement relied upon by the plaintiffs was valid and not void as against public policy, and (2) whether, even assuming those on board the *Sirdar* were guilty of negligence solely causing or partly contributing to the collision, the defendants nevertheless were liable for the whole of the damage occasioned by the collision.

Mr. C. B. Dunlop, K.C., and Mr. Lewis Noad (instructed by Mr. J. D. Ritchie) appeared for the plaintiffs: and Mr. L. Batten K.C., and Mr. D. B. Stenham (instructed by Messrs. Thos. Cooper & Co.) represented the defendants.

Mr. DUNLOP said that if his Lordship decided that under the terms of the towage contract the defendants were liable for the damage done to the plaintiffs' tug, whether there was negligence on the part of the tug or not, it would become unnecessary hereafter to try the question whether, as the plaintiffs alleged, the negligence was solely that of the defendants' steamer.

Mr. Justice HILL: I know of no principle of public policy which prevents people of sound mind from entering into a towage agreement of this kind. Fortunately, English law regards business people as being of sound mind and capable of looking after themselves.

Mr. BATTEN, for the defendants, pointed out that there was no alternative contract in use in the London Docks, and only tugs in the permanent or temporary ownership of the Port Authority were permitted to be used in the docks. The agreement, which was forced upon shipowners, put a limitation on the right of free access to the docks. It was an attempt to do by agreement that which could not be done by Act of Parliament; and he submitted that the contract, on that ground, was against public policy. Further, on the construction of the contract, he contended that neither the damage to the tug nor the damage to the tow fell within the terms of the contract.

JUDGMENT.

Mr. Justice HILL, in giving judgment, said: In this case two preliminary questions of law have to be determined. The action is by the Port of London Authority, owners of the tug *Sirdar;* the defendants being the owners of the American steamship *President Van Buren*, which was formerly known by the name *Old North State*. The action arises out of a collision between the *Sirdar* and the *President Van Buren* at a time when the *Sirdar* was acting as one of the tugs engaged in the work of towing the *President Van Buren* in the Tilbury Main Dock. For the purposes of the two issues of law, it is assumed that there was negligence on the part of those in charge of the *Sirdar*, although, of course, the plaintiffs' case is that the negligence which caused the collision was solely that of those in charge of the *President Van Buren*.

There is a counterclaim by the defendants in respect of damage to their vessel on the basis that the collision was solely caused by those in charge of the *Sirdar*. But, assuming it should ultimately be found that there was negligence on the part of those in charge of the *Sirdar*, the plaintiffs set up a contract under which the *Sirdar* and a second tug were engaged by the agents of the owners of the *President Van Buren;* and they say that by the terms of that contract they are not liable for any damage done by reason of negligence of those in charge of the *Sirdar*, but that, on the contrary, though there might have been negligence on the part of those in charge of the *Sirdar*, nevertheless they are entitled to claim against the defendants in respect of the damage to the *Sirdar*. It was in these circumstances that the defendants asked that the two preliminary questions should be tried.

The first is whether the agreement set up by the plaintiffs is valid and not void as against public policy. The second is, assuming the agreement to be valid, whether, if the collision was solely caused or partly contributed to by negligence on the part of those in charge of the *Sirdar*, the defendants are nevertheless liable for the whole of the damage occasioned by the collision. The contract which was sent in and signed by Messrs. Holt & Co., Ltd., as agents for the owners of the *President Van Buren*, on the face of it, asked for the supply of tugs on the terms and conditions endorsed, which terms and conditions they agreed to be bound by. The conditions endorsed, so far as material, were in the following terms:—

> The masters and crew of the tugs and transport then shall cease to be under the control of the port authority during and for all purposes connected with the towage or transport and shall become subject in all things to the orders and control of the master or person in charge of the vessel or craft towed or transported and are the servants of the owner or owners thereof who hereby undertake to pay for any damage caused to any of the port authority's property or premises and to bear, satisfy and indemnify the port authority against liability for all claims for loss of life or injury to person or loss or damage by collision or otherwise to the vessel or to or by the vessel or craft towed or to or by any cargo or other thing on board the same or to or by any vessel cargo or property of any other person or persons or to the tug or tugs supplied, whether such damage loss or injury arise

. . occasioned by any accident of by any omission, breach of duty, mismanagement, negligence or default of any of such masters, crew or such or any servant of the authority or any other person or from or by any defect or imperfection in the tug or tugs supplied . . .

Before considering the conditions, I should mention that the Port of London Authority are in control of the docks; that they own or hire the tugs used in the docks, the *Sirdar* being one of the tugs owned by them; that they supply all tugs for dock work and will not allow any outsider to do the work; and that wherever they do supply tugs they insist upon the terms contained in this contract. The United States Shipping Board, the defendants, had an appropriated berth in the Tilbury Dock and were in the habit of using the Port Authority's tugs in that connection; and the *Sirdar* was one of the tugs they usually employed.

On the first point as to whether the agreement is valid and not void as against public policy, I think the answer on this matter is that which I have already expressed, namely, that the English law, in my view, very fortunately regards business men as capable of knowing their own business and of making contracts for themselves and is very unwilling to limit the power of capable people to make what bargains they like. In truth, as we know, a contract in this form, or in a practically similar form, has become for a good many years past of almost universal use by tug owners; and whether a tug owner supplies a tug on these terms or on terms which reserve liability to himself (where he does it) it is only a question of price. If he is to have no liability, he can do the work very cheaply; if he is to run all the risks then of course his reward must be sufficient not only to compensate him for the work he does but to cover the insurance and, in fact, all the risks he runs. I can conceive no principle of public policy which should lead the Courts to say: "We ought to step in and say 'This or that contract ought not to be made by competent people,'" when the people making it are competent people. It is said that the Port of London Authority is a monopoly. It is said that everybody has a right to the use of the tugs on equal terms, but here, it is said, you cannot employ any other tugs than the Port of London Authority's tugs. There it is. If you do not like those terms and if they are too onerous, nobody forces you to use the Port of London Authority's docks. I do not like to enlarge upon it because it seems to me to be so clear that, if you are talking of public policy, the highest interest of public policy is that the law should not interfere with the transactions of business men when it can help it.

Mr. Dunlop has pointed out that there is a section—195, I think,—in the Port of London Authority (Consolidation) Act, 1920, which—I have not considered it, but I think very likely—may give any person, who feels himself aggrieved by being asked to enter into contracts of this kind, power to appeal to the Board of Trade, who may direct an inquiry, and it may be that if there is a grievance there is a means of getting the matter considered and remedied, if there is something to remedy.

The form of contract aims, in the first place, at making the master and crew of a tug for the time being the servants of the ship which is being towed; in the second place its aim is to deal with damage caused to the Port Authority's own property; and in the third place its aim is to deal with liabilities which may be incurred by the Port Authority by reason of damage to other people's property or to life. If the first section, which begins: "The masters and crews of the tugs" and ends "are the servants of the owner or owners" of the vessel towed, is effectual to do that which it sets out to do, it does not much matter what the rest of the conditions provide, because it will be that which the Port of London Authority contemplates; and if it effectually makes the masters and crews of tugs servants of the ship which is being towed—servants for the time being—then it will follow that the owner of the tow cannot claim for damage brought about by people who for the time being are his own servants; and he must also be liable for damage caused to the authority's property by persons who for the time being are his servants, the servants of the owners of the tow.

I have considered Mr. Batten's criticism. I think that clause does do what it sets out to do; and I think it sets out in terms that for all purposes connected with the towage the masters and crews of tugs are the servants of the owners of the tow. I do not think that can be limited in the way Mr. Batten suggests. I think it provides that for the purposes of the towage and for all purposes connected with the towage they are the servants of the owners of the tow. That, I think, is enough to show that for any negligence of those in charge of the *Sirdar*—the master and crew of the *Sirdar*—the owners of the *President Van Buren* are liable to the authority, that is to say, for any damage to the *Sirdar*, and cannot themselves claim in respect of any damage done to the *President Van Buren*.

I think it is also made quite clear by what follows that the owners of the tow undertake to pay for any damage caused to any of the Port of London Authority's property or premises. Thinking, as I do, that a portion of the conditions deals with the Port of London Authority's own property and is in contrast with the following part which deals with the liability of the Authority to other people, I see no reason for excluding from the general description of the Port of London Authority's property their tugs; and in my view, therefore, the owners of the tow, the *President Van Buren*, have undertaken to pay for damage caused to the Port of London Authority's property, the tug *Sirdar*.

In the third portion of the conditions they likewise undertake to bear loss or damage by collision to the vessel towed; and that includes all damage to the *President Van Buren*.

I must therefore answer the issues by

...ng (1) that the agreement is valid; ...d (2) that, if those on board the *Nordur* were negligent by solely causing the collision or contributing to the collision, the defendants are liable to the plaintiffs for the whole of the damage occasioned by them. I think that is the right way to answer the question as it is submitted; and, that being so, there will be judgment for the plaintiffs on the claim and counterclaim.

Mr. Noad observed that he wished to make it clear that, in effect, this was in no sense an interlocutory judgment.

His Lordship said that strictly he had only to decide the issues, but he gathered that Mr. Noad intimated that the practical result would be, as to the collision, that this was judgment for the plaintiffs on the claim and counterclaim, with costs.

ADMIRALTY DIVISION.

Wednesday, [illegible] 18, 1924.

THE "KELSOMEAD."

Before Mr. Justice Hill.

Collision—Objection to Registrar's report—Thrust shaft of plaintiff steamer broken—Whether fracture a consequence of the collision.

In this case, the plaintiffs, the owners of the steamship *Marquess*, moved in objection to the Registrar's Report, assessing the damages payable to them in respect of a collision between the *Marquess*, while at anchor, and the defendants' steamship *Kelsomead*, at Montevideo on May 17, 1921. Liability for the collision was admitted by the defendants, and, before the Registrar, the plaintiffs put in a claim totalling £12,553. The Registrar allowed only £5419. The plaintiffs now took exception to the report as regarded some thirteen items of their claim, two of which the Registrar had disallowed *in toto* and in regard to the remainder of which he had allowed only portions of the sums claimed. The defendants gave cross notice of motion in respect of a number of items which they contended consisted of expenses which were not incurred in consequence of the collision. The dispute largely turned upon the question of whether the thrust shaft of the *Marquess*, which broke while the vessel was on her way home from Montevideo to London, and had to be replaced, broke in consequence of the collision.

The Registrar held that the plaintiffs had not proved that the injury to the shaft was the result of the collision. The plaintiffs now contended that the proper inference to draw from the evidence and admitted facts was that the breaking of the thrust shaft was a consequence of the collision, and that the Registrar was wrong in disallowing the expenses in connection with renewing it in London.

Mr. A. D. Bateson, K.C. and Mr. I. H. Stranger (instructed by Messrs. Downing, Middleton & Lewis) appeared for the plaintiffs; and Mr. G. P. Langton (instructed by Messrs. Ingledew, Sons & Brown) represented the defendants.

The arguments were not concluded, and the hearing was adjourned.

ADMIRALTY DIVISION.

Friday, June 20, 1924.

THE "UGO BASSI."

Before Mr. Justice Hill, sitting with Captain T. Gilpin, C.B.E., and Captain G. Gundry, C.B.E., D.S.O., Elder Brethren of Trinity House.

Collision in dense fog — Disputed speeds — Whether negligent to go in fog from anchorage in bay into frequented waters.

This case involved a claim and counterclaim for damages arising out of a collision between the French steamship *Berville* and the Italian steamship *Ugo Bassi*, in the English Channel, off the Cornish coast, shortly before or at about midnight of Sept. 29-30, 1923.

Mr. D. Stephens, K.C., and Mr. H. C. S. Dumas (instructed by Messrs. Stibbe & Stokes) appeared for the plaintiffs; and Mr. A. D. Bateson, K.C., and Mr. Lewis Noad (instructed by Messrs. Gilbert Robertson & Co., of Cardiff, Messrs. Wm. A. Crump & Son, agents) represented the defendants.

According to the plaintiffs' case, at about midnight (G.M.T.) on Sept. 29/30, 1923, the *Berville*, a twin screw steel steamship of 1663 tons gross register and of the length of about 216 ft., was in the English Channel, bound from Coen to Newport with a cargo of about 1650 tons of steel billets. The weather was a dense fog, the wind about W.N.W. light airs, and the tide ebb running to the S.W. with the force of a little less than a knot. The *Berville*, which had been aground in Coverack Bay a little to the northward of Dolores Point, had, after getting afloat again and then anchoring for a time, again got under way and was steering a course of S. 70 E. true to get well clear of the land before resuming her course for the Lizard. With engines working as slow as possible she was making a speed of one-to one-and-a-half knots. She was duly exhibiting the regulation masthead and side lights for a steamship under way, including an optional additional masthead light and a fixed sternlight, all of which were burning brightly. A good look-out was being kept and the whistle was being sounded for fog at short and regular intervals.

In these circumstances those on board heard the prolonged blast of a steamship's whistle, apparently a considerable distance

Filed, Tampa, Fla., Apr. 24, 1968 No. 68-21 Civ-T

NOTICE OF RELIANCE UPON FOREIGN LAW

Defendant, UNTERWESER REEDEREI GMBH, through its attorneys undersigned, hereby files written notice pursuant to rule 44.1, Federal Rules of Civil Procedure, to the effect that the Defendant shall rely upon English and/or German law with respect to all issues which may ultimately be presented in connection with the above captioned cause. This notice is filed without prejudice to Defendant to rely upon other and different foreign law so long as Defendant shall give reasonable notice of reliance on foreign law other than as specified herein.

David C. G. Kerr
DAVID C. G. KERR OF
MACFARLANE, FERGUSON, ALLISON & KELLY
P. O. Box 1531, Tampa, Florida 33601
—and—
FARIS, ELLIS, CUTRONE, GILMORE & LAUTENSCHLAEGER
Whitney Building, New Orleans, Louisiana
ATTORNEYS FOR DEFENDANT

Filed, Tampa, Fla., Jul. 29, 1968 No. 68-21 Civ-T

MEMORANDUM AND ORDER

Defendant, a German corporation, appearing in its own behalf and as owner of the ocean-going tug M/S BREMEN, has moved the Court to decline jurisdiction and dismiss a maritime claim in a cause of breach of contract and tort brought by Plaintiff, a Delaware corporation, the owner of the Drill Barge (Rig) CHAPARRAL, or alternatively to decline jurisdiction or to stay proceedings.

The claim grows out of a casualty which occurred during performance of a towage contract executed in Bremen, Germany. By the contract Defendant agreed to tow

Plaintiff's drill barge from Venice, Louisiana, to Ravenna, Italy. In course of the tow voyage, the drill barge suffered a casualty and was towed into Tampa, Florida, by the Defendant's tug. On arrival at Tampa, Florida, Plaintiff caused the tug to be arrested by the United States Marshal pursuant to practice in admiralty proceedings.

Defendant urges that a paragraph of the Towage Contract, which provides:

> "Any dispute arising must be treated before the London Court of Justice"

defeats the jurisdiction of this Court and buttresses its position by seeking application of the doctrine of forum non conveniens. Its first contention is opposed by *Carbon Black Export, Inc. v. The Monrosa,* 254 F.2d 297 (5C. 1958), affirmed, 359 U. S. 999 (1959).

Even *Wm. H. Muller & Co.* v. *Swedish American Line, Ltd.,* 224 F.2d 806 (2 C. 1955), which under different facts held otherwise, recognizes that a similar clause does not defeat jurisdiction and held that jurisdiction should be declined only after a finding that the agreement is reasonable in a particular case.

Helpful criteria to be considered are given in *Mobile Tankers, S. A.* v. *Mene Grande Oil Co.,* 363 F.2d 611 (3 C. 1966), cert. denied, 385 U. S. 945 (1966):

> "The factors which must be considered and weighed include the following: libelant's choice of forum; status of the parties; convenience of parties and witnesses; access to sources of proof; cost of obtaining the attendance of willing witnesses; possibility of a view of the premises, if appropriate; relative advantages and obstacles to a fair trial; and, possible difficulty in the application of foreign law. Unless 'the balance is strongly in favor of the [Respondent], [the libellant's] choice of forum should rarely be disturbed.' *Gulf Oil Corp.* v. *Gilbert,* 330 U. S. 501, 67 S. Ct. 839, 91 L.Ed. 1055 (1947)."

The citizenship of the parties has been given. Plaintiff chose and obtained the jurisdiction of this Court. The prelude, including a partial performance, alleged casualty and aftermath here all occurred along or near the Gulf Coast of the United States of America and within or adjacent to the jurisdiction of the judicial circuit of which this Court is a part.

A great majority, if not all, of the witnesses are or were in the United States, including an alleged forty potential witnesses residing permanently here. Members of the Bar of this Court have spent considerable time in the investigation and preparation of the trial of this case, 33 oral depositions have been taken, including all of the officers and members of the crew of Defendant's tug and the Defendant's riding crew on Plaintiff's drill barge. Defendant itself has taken oral depositions and with the aid of this Court obtained production of documents, plans and other data.

Plaintiff has made an undisputed showing that English courts apply different tests and rules of liability in cases of this type than do many of the courts of this country.

The contract is printed in English and in any event interpreters would probably have to be used in taking testimony of the German crew, whether this cause is tried here or in England.

Defendant has not suggested and there is no showing that American courts are not capable of adjudicating this case fairly and justly. The balance of conveniences here is not strongly in favor of Defendant and Plaintiff's choice of Forum should not be disturbed.

For the reasons given, Defendant's Motions to Dismiss for Lack of Jurisdiction, Requesting the Court to Decline Jurisdiction on Grounds of Forum Non Conveniens,

and alternatively to stay further prosecution of these proceedings pending adjudication in England be, and they are each, DENIED.

DONE and ORDERED at Tampa, Florida, this 29th day of July, 1968.

Ben Krentzman
UNITED STATES DISTRICT JUDGE

Filed, Tampa, Fla., Aug. 8, 1968 No. 68-21-Civ-T

MOTION TO CERTIFY QUESTION PURSUANT TO 28 U.S.C.A. §1292(b)

Defendant, UNTERWESER REEDEREI GmbH, moves this Court to amend its Memorandum and Order entered in this cause on July 29, 1968 in order to include in said Memorandum and Order the Certificate requisite to entitle Defendant to take an interlocutory appeal pursuant to 28 U.S.C.A. § 1292(b). As grounds for said Motion, Defendant would show as follows:

1. The Memorandum and Order of July 29, 1968, is appealable only by virtue of 28 U.S.C.A. §1292(b).

2. The Memorandum and Order of July 29, 1968 involves controlling questions of law upon which there are substantial grounds for difference of opinion.

3. An immediate appeal from the Memorandum and Order of July 29, 1968, may materially advance the ultimate termination of the above captioned litigation.

Jack C. Rinard
for David C. G. Kerr, of
MACFARLANE, FERGUSON, ALLISON & KELLY
P. O. Box 1531, Tampa, Florida 33601
—and—
FARIS, ELLIS, CUTRONE, GILMORE & LAUTENSCHLAEGER
Whitney Building, New Orleans, Louisiana 70130
ATTORNEYS FOR DEFENDANT

Filed, Tampa, Fla., Jan. 16, 1969 No. 68-21 Civ-T

ORDER ON MOTION TO CERTIFY QUESTION PURSUANT TO 28 U.S.C.A. §1292(b)

This cause came on for hearing, after notice, upon the motion of Defendant Unterweser Reederei GmBh (hereafter Unterweser) to amend the Memorandum and Order entered in this cause on July 29, 1968 to include the Certificate needed to entitle the Defendant to take an interlocutory appeal pursuant to 28 U.S.C.A. § 1292(b), and the Court, having studied the motion and the memoranda submitted in support of and in opposition to the motion, having heard the argument of counsel, and being otherwise advised in the premises, finds:

1. That since the motion above described was filed, Unterweser has filed in this Court a complaint for exoneration from or limitation of liability in Case No. 68-290 Civ. T.

2. In Case No. 68-290 Civ. T:

a. This Court has entered an order restraining Zapata Off-Shore Company from prosecuting said suit.

b. Zapata Offshore Company has filed a claim and an answer to the complaint;

c. Unterweser has filed an objection to Zapata's claim and a counterclaim against Zapata, and

d. Zapata has filed a reply to Unterweser's counterclaim.

3. The voyage with respect to which Unterweser seeks exoneration from or limitation of liability in Case No. 68-290 Civ. T. is the voyage upon which the claim asserted by Zapata against Unterweser and the M. S. Bremen in Case No. 68-21 Civ. T. arose.

4. In view of the circumstances and developments mentioned above, the Motion to amend the Memorandum and Order of July 29, 1968 is moot.

5. The motion of defendant to certify question pursuant to 28 U.S.C.A. § 1292(b) should be denied.

It is therefore, upon consideration,

ADJUDGED, ORDERED AND DECREED, that the motion of the defendant to certify question pursuant to 28 U.S.C.A. § 1292(b) be, and it is hereby, denied.

DONE AND ORDERED in Chambers at Tampa, Florida this 16th day of January, 1969.

Ben Krentzman
U. S. DISTRICT JUDGE

Filed, Tampa, Fla., Jul. 2, 1968 No. 68-290 Civ-T

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

In the Matter of the Complaint
of
UNTERWESER REEDEREI, GMBH
for exoneration from, or
limitation of liability
as owner of the M/S BREMEN

COMPLAINT

The Complaint of UNTERWESER REEDEREI GMBH, as owner of M/S BREMEN, in a cause of exoneration from or limitation of liability, civil and maritime, within the meaning of Rule 9 (h) and Supplemental Rule F, Federal Rules of Civil Procedure, alleges upon information and belief as follows:

FIRST: Plaintiff, Unterweser Reederei GmbH was at all times hereinafter mentioned and is now a German corporation having its principal place of business in Bremen, Germany, and is the sole owner of M/S BREMEN.

SECOND: The M/S BREMEN is a steel, ocean-going tug boat of about 1200 gross tons, 54 meters in length and 12 meters in breadth, built at Bremerhaven, Ger-

many, in July 1967. M/S BREMEN is of German registry having her home port at Bremen, Germany, and at all times material hereto has been used by Plaintiff in ocean towage service.

THIRD: M/S BREMEN was, at all times herein mentioned, in all respects seaworthy, properly and efficiently officered, manned, supplied, equipped and furnished, well and sufficiently fitted with suitable engines, machinery, tackle, apparel, appliances and furniture, all in good order and condition and suitable for the business and voyages in which she was engaged; the owners of M/S BREMEN had, at the commencement of the voyage of said vessel hereinafter mentioned, and at all times prior thereto, and at all times thereafter, herein mentioned, exercised due diligence to make said vessel in all respects seaworthy and properly and efficiently officered, manned, equipped, supplied and furnished, and well and sufficiently fitted and supplied with suitable engines, machinery, tackle, apparel, appliances and furniture.

FOURTH: M/S BREMEN was arrested by the United States Marshal for the Middle District of Florida on January 12, 1968, at Tampa, Florida, in accordance with the usual proceedings in admiralty actions. Subsequently Plaintiff posted adequate security and M/S BREMEN was released from arrest and immediately proceeded to Bremen, Germany. M/S BREMEN is presently being operated by Plaintiff out of the port of Bremen, Germany.

FIFTH: On January 5, 1968, M/S BREMEN sailed from Venice, Louisiana, on a voyage to Ravenna, Italy, having in tow the drill barge CHAPARRAL. M/S BREMEN was under the command of a competent and experienced master and was fully manned by competent licensed officers and unlicensed personnel. M/S BREMEN proceeded upon said voyage without untoward incident, until on the morning of January 9, 1968, at about 0500, the bow leg of the drill barge CHAPARRAL broke and severed the towing hawsers; the said drill barge be-

coming adrift and helpless upon the seas. At the time of the casualty M/S BREMEN stood by drill barge CHAPARRAL and took aboard from said drill barge the crew thereof. Thereafter, at about 1200, the remaining two legs of drill barge CHAPARRAL broke and fell into the sea. At about 1400 M/S BREMEN put several crew members aboard the drill barge in order to reconnect a tow line. A tow line was reconnected by about 1700 and M/S BREMEN received orders from the owner of drill barge CHAPARRAL to tow said barge into the port of Tampa, Florida. M/S BREMEN proceeded to Tampa, Florida, with drill barge CHAPARRAL, arriving on January 12, 1968. Other than the loss of its towage gear, M/S BREMEN sustained no physical damage.

SIXTH: The said casualty, losses and damages were not due to any breach of contract, default, fault, design, neglect, or want of care on the part of Plaintiff or those in charge of M/S BREMEN; nor was said casualty, losses and damages occasioned by any defect or unseaworthy condition of M/S BREMEN.

SEVENTH: Upon information and belief, the casualty was caused through the fault, negligence, carelessness and incompetency of the owner and/or those in charge of and controlling the said drill barge CHAPARRAL and/or the unseaworthiness of CHAPARRAL, or else was due to other causes for which Plaintiff is not liable.

EIGHTH: The casualty happened, and the loss and damages above referred to, were done, occasioned and incurred, without the design or neglect or fault on the part of Plaintiff, and without the privity or knowledge of Plaintiff or its officers or managing agents.

NINTH: As a result of the casualty hereinabove described, a suit in Admiralty has been brought in the United States District Court for the Middle District of Florida, Tampa Division, against the M/S BREMEN and Plaintiff, by Zapata Off-Shore Company as owner of drill barge CHAPARRAL, to recover alleged damages in the sum of $3,500,000.00; atorneys for Zapata Off-

Shore Company being James Nance, of Baker, Botts, Shepherd & Coates, 1600 Esperson Building, Houston, Texas, and Dewey R. Villareal, of Fowler, White, Collins, Gillen, Humkey & Trenam, P. O. Box 1438, Tampa, Florida. Said case is styled as "Zapata Off-Shore Company vs. M/S BREMEN and Unterweser Reederei, GmbH, Case No. 68-21 Civ. T." Plaintiff asserts that the demands made in such action greatly exceed the value of M/S BREMEN and its pending freight, if any, or the interest of Plaintiff therein; further, Plaintiff fears the filing of additional claims.

TENTH: There are no demands, unsatisfied liens or claims of lien against M/S BREMEN or Plaintiff arising out of the voyage aforesaid, or any suits pending, so far as is known to Plaintiff, other than as above set forth.

ELEVENTH: This complaint is filed within six months after the date of the casualty aforesaid and within six months after Plaintiff first received written notice of claim from any claimants.

TWELFTH: The value of M/S BREMEN subsequent to the foregoing casualty, as evidenced from the affidavits attached hereto as Exhibits "A" and "B", did not, and does not, exceed the sum of $1,300,000.00 Plaintiff asserts that under the circumstances of this case there was no freight pending within the meaning of the applicable statutes; nevertheless, Plaintiff includes the sum of $90,000.00 within the security given in these proceedings, which sum represents the approximate amount of towage hire pending as evidenced by the affidavit attached hereto as Exhibit "C"; such sum though included within the security is with full reservation to urge that said sum should not be included within the security and with full reservation to move the security so given should be accordingly decreased; thus, the aggregate value of Plaintiff's interest in M/S BREMEN and her pending freight as reflected by the aforementioned affidavits does not exceed $1,390,000.00; Plaintiff asserts that the aggregate value so stated is consonant with sta-

tutes of the United States and is set forth without prejudice to Plaintiff's right to urge applicability of foreign law as specified hereinbelow.

THIRTEENTH: Plaintiff desires to contest its liability and the liability of M/S BREMEN for the injuries, losses and damages, whether to persons or property, caused, occasioned or incurred upon said voyage, and particularly any losses and damage incurred by the owners of drill barge CHAPARRAL; Plaintiff alleges that it has valid defenses thereto on the facts and on the law. Plaintiff further claims the immunities and the benefit of exoneration from or the limitation of liability provided for by the law of England, which law constitutes the law of the contract between Plaintiff and the owner of CHAPARRAL, said law being The Merchant Shipping Acts, 1894 to 1958; alternatively, Plaintiff claims the immunities and benefit of exoneration from or the limitation of liability provided for by the law of Germany which law constitutes the law of the flag of M/S BREMEN, said law being Section 486, Paragraphs I and II, German Commercial Code; alternatively, Plaintiff claims immunities and the benefit of exoneration from or the limitation of liability provided for by Title 46, United States Code, Sections 181 *et seq,* and the various statutes supplementary thereof, and to that end Plaintiff is ready and willing to give stipulation with sufficient surety for the payment into Court of the amount or value of its interest in M/S BREMEN whenever the same shall be ordered by the Court as provided by the aforesaid Statutes of the United States, by Rule F, Federal Rules of Civil Procedure, and by the rules and practices of this Court; the stipulation with surety which Plaintiff will tender will be the amount of its interest in M/S BREMEN and her pending freight, if any, which amount is as required by the aforementioned Statutes of the United States; Plaintiff will give stipulation in such amount, pursuant to such statutes, without prejudice to its right to provide stipulation in a different or lesser amount as may ultimately be determined

by this Court to be the proper amount consonant with the law of England and/or Germany as aforesaid; while standing ready and willing to give stipulation as aforesaid Plaintiff in no way admits that it is under any liability for the losses and damages occuring as aforesaid; Plaintiff here claims and reserves the right to contest in this or any other Court any liability thereof,) whether personally or of said M/S BREMEN; Plaintiff claims and is entitled to limit its liability in the premises, if any, to the amount specified by the law of England or the law of Germany, or alternatively the Statutes of the United States, together with pending freight, if any, if the same be required under the law of England or of Germany or alternatively the Statutes of the United States.

A. Plaintiff's right to limit its liability is governed by the law of England by virtue of the Towage Contract, attached hereto as Exhibit "D", entered into between Petitioner and the owner of drill barge CHAPARRAL at Bremen, Germany, on November 3, 1967. In paragraph 8 of the General Towage Conditions of said contract the parties agreed that all disputes arising between them should be submitted to the London Court of Justice. Pursuant to English law such contractual agreement gives jurisdiction to the English Courts, and the English Courts accept such jurisdiction. The contractual provision is construed by the law of England as requiring the application of English law to any controversies submitted to the English Courts in accord with said provision. Plaintiff's right to limit its liability in the premises is governed by the law of the contract; i.e. English law. The Merchant Shipping Acts, 1894 to 1958, constitute the English limitation of liability statutes. Those statutes are construed by English courts as creating substantive rights in favor of those entitled to the benefit of its provisions; thus the provisions of said Act attach specifically to the right of Plaintiff to limit its liability herein, notwithstanding that this Complaint is not filed in an English forum. Pursuant to the English limitation

of liability acts the limitation fund is computed at the rate of 28 pounds sterling per vessel ton, or in the case of M/S BREMEN said fund would not exceed 33,600 pounds sterling.

B. The limitation of liability law of Germany is relied upon by Plaintiff in the alternative as the law of the flag of M/S BREMEN. The German limitation law is set out in Section 486, Paragraphs I and II, German Commercial Code. However, pursuant to German International Private Law the law which governs limitation of liability is the law which would govern the claim asserted against Plaintiff herein; i.e. the law of England. Accordingly, pursuant to German law, the above mentioned English limitation statutes would apply by virtue of the contractual agreement of the parties as set out in Exhibit "D".

FOURTEENTH: Plaintiff elects to file herein an *ad interim* stipulation with good and sufficient surety, as required by the rules of this Court, in the amount of $1,390,000.00 with interest at the rate of 6% per annum from the date thereof, for the payment of Plaintiff's aggregate interest in M/S BREMEN into Court; as hereinabove asserted, Plaintiff files this *ad interim* stipulation in accordance with the Statutes of the United States without prejudice to its right to rely upon foreign law as specified hereinabove and without prejudice to contest the inclusion of towage hire pursuant to foreign law or the Statutes of the United States.

FIFTEENTH: All and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court; Plaintiff files its Complaint for exoneration from or limitation of liability in this Court by virtue of the fact that M/S BREMEN was arrested under process issuing from the United States District Court, Middle District of Florida, Tampa Division, in the aforementioned action commenced by the owner of drill barge CHAPARRAL and styled as "Zapata Off-Shore Company vs. M/S BREMEN and Unterweser Reederei GmbH, Case No. 68-21 Civ. T.;" by reason of

the institution of said action Plaintiff was brought before the District Court contrary to the aforesaid contractual obligation of the owner of drill barge CHAPARRAL as set forth in Exhibit "D", compelling Plaintiff to file this Complaint in order to preserve its right within the statutory period of limitation set forth in the above cited Statutes of the United States. Accordingly, Plaintiff asserts herein, as it asserted in the pending action by motion filed on January 29, 1968, to dismiss said action on the ground of lack of jurisdiction, or alternatively, for entry of an order declining jurisdiction and/or staying the further prosecution of these proceedings, on which no ruling has been entered to date, that the proper forum for prosecution of claims by the owner of the drill barge CHAPARRAL is the High Court of Justice, London, England. Plaintiff reserves all rights under aforesaid motion and reasserts herein that the High Court of Justice, London, England, is the proper forum for determining all rights including that of Plaintiff to be exonerated from or to limit liability, and that in any event, irrespective of the forum, all rights of the parties including Plaintiff's right to be exonerated from or to limit liability must be determined in accordance with the law of England or alternatively the law of Germany hereinabove alleged.

WHEREFORE, Plaintiff prays:

1. That upon the filing of said *ad interim* stipulation in the amount of $1,390,000.00 with interest at 6% per annum, the Court shall cause a monition to be issued against all persons claiming damages for any and all losses, damages, injuries or destruction done, occasioned, sustained, or incurred by or resulting from the casualty aforesaid or in any way consequent thereupon or during the voyage upon which M/S BREMEN was then engaged, citing them to appear as directed in said monition and make due proof of their respective claims, and also to appear and answer the allegations of this Complaint, according to law and the practice of this Court, on or before a certain time to be fixed by the monition.

2. That the Court upon the filing of said *ad interim* stipulation, enter an order directing that an injunction shall issue restraining the prosecution of any and all suits, actions and proceedings already begun to recover damages arising out of, occasioned by, or consequent upon the casualty aforesaid set forth in the Complaint or during the voyage upon which M/S BREMEN was then engaged, and the commencement or prosecution hereafter of any suit, action or legal proceeding of any nature or description whatsoever, including actions against insurers, except in the present proceeding against Plaintiff or its agents or representatives or against M/S BREMEN, her engines, etc., in respect of any claim or claims arising out of the aforesaid voyage and the casualty.

3. That should any claimant, who shall have filed his claim under oath, file an exception controverting the value of M/S BREMEN in her condition, alleged herein, in the amount of the *ad interim* stipulation aforesaid, this Court shall cause due appraisal to be made of the value of M/S BREMEN subsequent to the incident referred to herein on January 9, 1968, and to the value of Plaintiff's interest in said vessel, and, in which event, this Court enter an order for the payment into Court for the value of Plaintiff's interest therein, or for the giving of a stipulation in the usual form under the rules for payment into Court for the value of Plaintiff's interest therein.

4. That the Court in this proceeding will adjudge that Plaintiff is not liable for any loss, damage, injury or destruction, or for any claim whatsoever in any way arising from or in consequence of the aforesaid voyage; or, if Plaintiff shall be adjudged liable, then that such liability be limited to the amount, value or interest required by the aforesaid law of England, or alternatively the law of Germany, or alternatively the amount, value or interest specified by the above mentioned Statutes of the United States, and that Plaintiff be discharged therefrom upon the surrender of such interest, and that the

money surrendered, paid or secured to be paid as aforesaid be divided pro rata according to the hereinabove mentioned laws among such claimants as may duly prove their claims in accordance with the provisions of the order hereinabove prayed for, saving to all parties any priorities which they may be legally entitled, and that a decree may be entered discharging Plaintiff from all further liability.

5. That Plaintiff may have such other and further relief as the justice of the cause may require.

David C. G. Kerr
DAVID C. G. KERR OF
MACFARLANE, FERGUSON, ALLISON & KELLY
P. O. Box 1531, Tampa, Florida 33601
—and—
FARIS, ELLIS, CUTRONE, GILMORE & LAUTENSCHLAEGER
Whitney Building, New Orleans, Louisiana
ATTORNEYS FOR PLAINTIFF

Filed, Tampa, Fla., July 2, 1968 No. 68-290 Civ. T.

AD INTERIM STIPULATION

WHEREAS, Plaintiff, UNTERWESER REEDEREI, GMBH, as owner of the M/S BREMEN, has concurrently herewith filed a Complaint in this Court for exoneration from or limitation of liability in respect of the matters and things set out in said Complaint and which Plaintiff, among other things, has elected to file an *ad interim* stipulation for the aggregate value of the M/S BREMEN and its pending freight, and Plaintiff's interest in said vessel, at the time referred to in said Complaint and the interest and costs in accordance with the Federal Rules of Civil Procedure and of this Court, and praying that a monition may issue to all persons having or asserting any claims by reason of any act, matter, thing, loss, damage, injury, death, or destruction done, occa-

sioned or incurred by reason of the matters and happenings and the events referred to in said Complaint, citing them to file their claims with the Clerk of this Court and make due proof of their respective claims and answer the Complaint herein, and that a restraining order issue enjoining the commencement and prosecution of any and all actions, claims or proceedings except under and in pursuance of the provisions of a monition herein granted, and

WHEREAS, the Plaintiff wishes to prevent the prosecution of all proceedings against Plaintiff, or M/S BREMEN, and the commencement or prosecution hereafter of any and all suits, actions and legal proceedings of any kind, nature or description whatever in any and all courts, growing or arising out of the matters and happenings recited in said Complaint, against Plaintiff or M/S BREMEN, except in the present proceedings, and also wish to provide an *ad interim* stipulation for the value of said vessel at the time alleged in the Complaint, pending the ascertainment by reference, if ordered, of the amount of Plaintiff's interest in said vessel at the time alleged in the Complaint;

NOW, THEREFORE, in consideration of the premises, UNTERWESER REEDEREI, GMBH, Plaintiff herein, as principal, and NATIONAL SURETY CORPORATION, as Surety, hereby undertake in the sum of ONE MILLION THREE HUNDRED NINETY THOUSAND AND NO/100 ($1,390,000.00) Dollars, with interest thereon at the rate of six (6%) per cent per annum from the date of this stipulation and costs that Plaintiff, UNTERWESER REEDEREI, GMBH, will pay into Court if and whenever the Court shall order, the aggregate amount or value of Plaintiff's interest in M/S BREMEN at the time described in the Complaint, together with pending freight, if any, or at such earlier time as the Court may fix, and with interest thereon at the rate of six (6%) per cent per annum from the date of this stipulation, and costs, or will file in this proceeding a bond or stipulation for the said value, in the usual

form, with an approved surety in said amount, and that pending payment into the Court of the amount or value of Plaintiff's interest in M/S BREMEN at the time alleged in the Complaint as may be ascertained and determined under the orders of said Court or the giving of a stipulation for value therefor, this stipulation shall stand as security for all claims in said limitation proceedings.

Said Surety hereby submits itself to the jurisdiction of the Court and agrees to abide by all orders of the Court, interlocutory or final, and to pay the amount awarded by the final decree rendered by this Court, or by the Appellate Court if an appeal intervene, with interest, to the amount of this stipulation with interest from date hereof as aforesaid, unless the amount or value of Plaintiff's interest, if any, in M/S BREMEN, together with pending freight, if any, with interest aforesaid shall be paid in the Court by Plaintiff, or a stipulation for value therefor shall be given as aforesaid in the meantime, in which event, this stipulation is to be void.

EXECUTED at Tampa, Florida, this 2d day of July, 1968.

UNTERWESER REEDEREI, GMBH,

Principal

By: *Jack C. Rinard* Of
MACFARLANE, FERGUSON, ALLISON & KELLY
—and—
FARIS, ELLIS, CUTRONE, GILMORE & LAUTENSCHLAEGER
Attorneys for Principal
NATIONAL SURETY CORPORATION

[Seal]

By: *Elizabeth T. Davis*
Attorney-in-Fact
ELIZABETH T. DAVIS
COUNTERSIGNED at CLEARWATER, FLORIDA
By *John Chestnut, Jr.*
Resident Agent

Filed, Tampa, Fla., Jul. 2, 1968 No. 68-290 Civ. T.

NOTICE OF RELIANCE UPON FOREIGN LAW

Plaintiff, UNTERWESER REEDEREI, GMBH, through its attorneys undersigned, hereby files written notice pursuant to rule 44.1, Federal Rules of Civil Procedure, to the effect that the Plaintiff shall rely upon English and/or German law with respect to all issues which may ultimately be presented in connection with the above captioned cause. This notice is filed without prejudice to Plaintiff to rely upon other and different foreign law so long as Plaintiff shall give reasonable notice of reliance on foreign law other than as specified herein.

David C. G. Kerr
DAVID C. G. KERR OF
MACFARLANE, FERGUSON, ALLISON & KELLY
P. O. Box 1531, Tampa, Florida 33601
—and—
FARIS, ELLIS, CUTRONE, GILMORE & LAUTENSCHLAEGER
Whitney Building, New Orleans, Louisiana
ATTORNEYS FOR PLAINTIFF

Filed, Tampa, Fla., Jul. 5, 1968 No. 68-290 Civ. T.

ORDER FOR MONITION
- and -
RESTRAINING ORDER

A Complaint, having been filed herein, on the 2nd day of July, 1968, by UNTERWESER REEDEREI GMBH, owner of M/S BREMEN, claiming the benefit of limitation of liability as provided by the law of England and Germany or alternatively Title 46, United States Code, Sections 181 *et seq*, as amended, exonerating the shipowner from liability and granting a shipowner limitation of liability for all injuries, deaths, losses and damages,

whether of, or to, persons or property, and for any act, matter or thing, loss or damage done, occasioned or incurred by, or because of, or arising out of the collapse of the legs of drill barge CHAPARRAL while in tow of M/S BREMEN in the Gulf of Mexico on January 9, 1968; and

Plaintiff having with its Complaint elected to file an *ad interim* stipulation with Plaintiff, UNTERWESER REEDEREI GMBH, as principal, with approved surety thereon in the amount of One Million Three Hundred Ninety Thousand and No/100 ($1,390,000.00) Dollars, with interest at the rate of six per cent (6%) per annum from date of said *ad interim* stipulation, and costs, undertaking to pay into Court whenever the Court shall so order, the aggregate value of Plaintiff's interest in M/S BREMEN at the time stated in the Complaint, with interest at six per cent (6%) per annum from date of said stipulation, and costs, or to file in this proceeding a bond or stipulation for the said amounts and values in the usual form, with approved surety in said amounts, and agreeing further that, pending the appraisement and payment into Court of the amount of the value of Plaintiff's interest in M/S BREMEN, or the giving of a stipulation for the value thereof, the said *ad interim* stipulation for value shall stand as security for all claims in said limitation proceedings; and,

It appearing that the amount of said *ad interim* stipulation is for the value of the said vessel, stated in said Complaint, and has been accompanied by affidavits of competent persons, corroborating the statement in the Complaint as to the value of said vessel, and that said Complaint, stipulation, affidavits and all proceedings of Plaintiff herein, comply with the rules of Court and law thereunto pertaining;

NOW, THEREFORE, on motion of Plaintiff, through its attorneys, Messrs. Macfarlane, Ferguson, Allison & Kelly and Messrs. Faris, Ellis, Cutrone, Gilmore & Lautenschlaeger;

IT IS ORDERED that a monition issue out of and under the seal of this Court against all persons, firms or corporations claiming or asserting any claims for loss of life, damages, injuries, salvage, detention, or for any act, matter or thing done, occasioned or incurred by, in or because of the events herein above and in said Complaint stated, citing said persons and claimants, and each of them, to file their respective claims with the Clerk of this Court, in writing, under oath, and to serve a copy thereof on attorneys for Plaintiff and to appear before this Court and make due proof of their respective claims as directed by the Court and to answer all of the allegations of the Complaint herein at or before the 5th day of October, 1968; and

IT IS FURTHER ORDERED that public notice of said monition shall be given in the Tampa Tribune, a newspaper published in the City of Tampa, Florida, once each week for four successive weeks before the return day of said monition, to-wit, for four successive weeks before October 5th, 1968, and

IT IS FURTHER ORDERED, that Plaintiff, not later than the day of the said second publication of said notice, mail a copy of said notice to all persons, firms or corporations listed in the Complaint, on file herein, as having, or having made, claims by reason of the matters referred to in said Complaint at the addresses of said persons, firms or corporations or their attorneys, as set forth in said Complaint; and

IT IS FURTHER ORDERED that the filing, commencement and prosecution, in any Court whatever, of any and all actions, suits or legal proceedings of any kind, nature or description, for loss of life, damages, injuries, salvage, detention, or in respect of any matter, act or thing, occasioned or incurred or arising out of the facts, circumstances and occurrences set forth in the Complaint herein be, and the same are, and each of them, is hereby restrained and enjoined against Plaintiff, UNTERWESER REEDEREI GMBH, M/S BREMEN and

the underwriters and insurers of said party and vessel; provided, however, this Court expressly reserves jurisdiction over the action pending in this court and styled "Zapata Off-Shore Company vs. M/S BREMEN and Unterweser Reederei, GmbH", Case No. 68-21 Civ. T. for the sole purpose of entering its ruling and the final adjudication of the motion of Defendant therein pending to dismiss said action on the ground of lack of jurisdiction, or alternatively, for entry of order declining jurisdiction and/or staying further prosecution of such proceedings.

IT IS FURTHER ORDERED that the service of this order as a restraining order be made within this district, in the usual manner, by a certified copy of this order to the person or persons to be restrained, or to the attorneys of record, or acting in their behalf, and in any other district, by the mailing of a certified copy of this order by registered mail to the person or persons to be restrained or to his or their respective attorneys of record or acting in their behalf.

DONE and ORDERED at Tampa, Floida, this 5th day of July, A.D. 1968.

Ben Krentzman
UNITED STATES DISTRICT JUDGE

Filed, Tampa, Fla., Oct. 2, 1968 No. 68-290 Civ. T.

MONITION

THE PRESIDENT OF THE UNITED STATES TO THE MARSHAL OF THE UNITED STATES OF AMERICA FOR THE MIDDLE DISTRICT OF FLORIDA,

GREETINGS:

WHEREAS, a Complaint was filed in the District Court for the United States for the Middle District of Florida, Tampa Division, on July 2, 1968, by UNTERWESER REEDEREI GMBH, owner of M/S BREMEN, praying for exoneration from or limitation of its liability

concerning the losses, damages, injuries, salvage, detention and demands occasioned or incurred by reason of the matters or happenings recited in said Complaint, arising out of, or resulting from, the collapse of the legs of the drill barge CHAPARRAL while being towed by M/S BREMEN in the Gulf of Mexico on January 9, 1968, for the reasons mentioned in said Complaint, and praying that a Monition issue out of said Court, citing all persons, firms or corporations claiming damages for any and all such losses, injuries, losses of life, salvage, damages and detention, to appear before said Court and make due proof of their respective claims and to answer the allegations of said Complaint; and, if it shall appear that Plaintiff is not liable for such claims or demands, it may be so finally adjudged by this Court; and

WHEREAS, Plaintiff, UNTERWESER REEDEREI GMBH, has filed in the office of the Clerk of this Court an *ad interim* stipulation in the sum of One Million Three Hundred Ninety Thousand and No/100 ($1,390,000.00) Dollars, with interest at six per cent (6%) per annum from date of said stipulation, executed on the 2nd day of July, 1968, with NATIONAL SURETY CORPORATION, as surety, undertaking to pay into Court, whenever the Court shall so order, the aggregate value of Plaintiff's interest in M/S BREMEN, in the condition in which she was after the aforesaid occurence, or, at such earlier time as the Court may fix, with interest at six per cent (6%) per annum from the date of said stipulation, and costs, or, to file in this proceeding a bond or stipulation for the said amounts and values, in the usual form, with approved surety, in said amount;

And the Court having directed by an order made and entered on July 5, 1968, that a Monition issue against all those claiming losses, injuries, losses of life, salvage, damages and detention, as hereinafter set forth, citing them to appear before this Court to make due proof of their respective claims on or before the 5th day of October, 1968, and to answer all the allegations of the Complaint herein;

You are commanded to cite all persons, firms and corporations claiming any, or asserting any claim for losses, injuries, losses of life, damages, salvage, detention or for any act, matter, or thing done, occasioned or incurred by, in or because of the casualty hereinabove set forth, to appear before said Court and make due proof of their respective claims as the Court shall direct, and to answer all of the allegations of the Complaint herein at or before the 5th day of October, 1968, or within such further time as the Court may grant and to have and receive such relief as may be due and to give public notice of this Monition by publishing notice thereof in the Tampa Tribune, a newspaper published in the city of Tampa, Florida, once a week for four successive weeks before the 5th day of October, 1968.

And what you have done in the premises, you do then make return to this Court, together with this writ.

WITNESSETH the Honorable Judges of the United States District Court for the Middle District of Florida, this 8th day of July, 1968.

WESLEY R. THIES, CLERK
By: *Robert H. Cooke*
Deputy Clerk

Filed, Tampa, Fla., Jul. 8, 1968 No. 68-290 Civ-T.

CLAIM

Zapata Off-Shore Company, as owner of the drill rig CHAPARRAL, makes claim against the above named Unterweser Reederei GMBH and against the said M/S BREMEN as follows:

Zapata Off-Shore Company is a corporation organized and existing under the laws of the State of Delaware and is now and was at all times mentioned in the Petition of Unterweser Reederei GMBH for Exoneration from or Limitation of Liability, the owner of the drill rig CHAPARRAL which, on the 9th day of January, 1968,

while under tow of the said M/S BREMEN, in the Gulf of Mexico, sustained the loss of three legs with which it was equipped or outfitted and heavy damage to the drill rig, its hull and appurtenances.

The loss of the legs and the other damage sustained by the drill rig CHAPARRAL was proximately caused by and/or proximately contributed to by the unseaworthiness of the M/S BREMEN, the negligence of those in charge of the M/S BREMEN, the negligence of Unterweser Reederei GMBH, and with the privity and knowledge of the management of Unterweser Reederei GMBH, or one or more of the foregoing.

In consequence of the loss of the legs of the CHAPARRAL, the damages sustained by the CHAPARRAL and the loss of the use of the CHAPARRAL during the repair period following the casualty of January 9, 1968, the Zapata Off-Shore Company has sustained damages in the total sum of Three Million Five Hundred Thousand Dollars ($3,500,000), as nearly as the same can now be ascertained.

Wherefore, the said Zapata Off-shore Company, as owner of the drill rig CHAPARRAL as aforesaid, presents its claim for Three Million Five Hundred Thousand Dollars, with interests and costs thereupon.

BAKER, BOTTS, SHEPPARD & COATES
Esperson Building
Houston, Texas

and

FOWLER, WHITE, COLLINS, GILLEN, HUMKEY AND TRENAM
P. O. Box 1438
Tampa, Florida

By: *Brendan P. O'Sullivan*
Attorneys for Claimant

Filed, Tampa, Fla., Jul. 24, 1968 No. 68-290 Civ-T

ANSWER OF ZAPATA OFF-SHORE COMPANY

Zapata Off-Shore Company answers the Complaint of Unterweser Reederei, GMBH, as owner of the M/S BREMEN, in a cause of exoneration from or limitation of liability, upon information and belief as follows:

1. Admitted

2. Admitted

3. Denied

4. Admitted except as to the last sentence of the fourth paragraph of the Complaint as to which Zapata Off-Shore Company is without knowledge or information sufficient to form a belief.

5. Zapata Off-Shore Company admits the allegations of the first sentence of the fifth paragraph of the Complaint except as to the date, denies the allegatons of the second sentence, denies the allegations of the third sentence insofar as they allege that the voyage proceeded without untoward incident until about 0500 on the morning of January 9, 1968 and admits the remaining allegations of the fifth paragraph of the Complaint except the allegation that the BREMEN lost its tow gear which is denied.

6. Denied

7. Denied

8. Denied

9. Admitted except with respect to the allegation that the plaintiff fears the filing of additional claims as to which Zapata Off-Shore is without knowledge or information sufficient to form a belief.

10. Zapata Off-Shore Company is without knowledge or information sufficient to form a belief as to the truth of the matters alleged in the tenth paragraph of the Complaint.

11. Admitted

12. Denied

13. Zapata Off-Shore Company recognizes that the plaintiff desires to contest its liability and the liability of the BREMEN as alleged; denies that the plaintiff has valid defenses to claims for loss and damage sustained upon the voyage; denies that the law of England or the law of Germany govern the rights and liabilities of the parties to this lawsuit; admits that the law of the United States governs the rights and the liabilities of the parties to this suit; is without knowledge or information sufficient to form a belief as to the readiness and willingness of the plaintiff to give a stipulation with surety for the payment into Court of the amount or value of the plaintiff's interests in the BREMEN plus pending freight; admits that the giving of security by the plaintiff is without prejudice to the plaintiff's right to provide a stipulation in a different amount as may ultimately be determined by this Court but denies that the amount is to be determined in accordance to the laws of England or Germany; recognizes that by the giving of the stipulation the plaintiff does not admit liability for losses and damages occurring on the voyage; recognizes that the plaintiff claims the right to contest liability for such losses and damages but denies that the plaintiff has any right to contest such claims for losses and damages in any Court other than this one, whether personally or with respect to the M/S BREMEN; denies that the plaintiff is entitled to limit its liability in the premises to any amount, whether specified by the laws of England, Germany or the United States.

A. Zapata Off-Shore Company denies that the plaintiff's right to limit liability is governed by the laws of England; denies the statement of English law expressed in sub paragraph "A" and denies that the limitation fund computed in accordance with the law of England would not exceed 33,600 pounds sterling. Zapata Off-Shore Company says that the governing law applicable in this proceeding is the law of the United States.

B. Zapata Off-Shore Company denies that the plaintiff is entitled to rely upon the law of Germany herein or the law of England as the same might be applied pursuant to German International Private Law, or otherwise. Zapata Off-Shore Company says that the governing law applicable in this proceeding is the law of the United States.

14 Zapata Off-Shore Company denies that the ad interim stipulation described in the fourteenth paragraph of the Complaint is sufficient in amount, denies that the ad interim stipulation is in compliance or accordance with the laws of the United States and denies that the plaintiff is entitled to seek limitation of liability in this proceeding without prejudice to its claimed right to rely upon foreign law and contest the inclusion of tow hire pursuant to foreign law or the law of the United States.

15. Zapata Off-Shore Company denies the truth of the premises, admits the admiralty and maritime jurisdiction of this Court, is without knowledge or information sufficient to form a belief as to those parts of the fifteenth paragraph of the Complaint that apparently undertake to set forth the considerations which motivated the plaintiff to file its Complaint herein; admits that the M/S BREMEN was arrested under process issuing from this Court in the suit described in the fifteenth paragraph of the Complaint; denies that the suit was brought contrary to the contractual provision mentioned; denies that the plaintiff was compelled to file this Complaint in order to preserve its rights to the benefit of the limitation of liability statutes of the United States; denies that the proper forum for the prosecution of claims by Zapata Off-Shore Company is the High Court of Justice at London, England; denies that the plaintiff is entitled to seek limitation of liability or exoneration from liability in this Court and simultaneously seek to have this Court decline jurisdiction of the suit commenced by Zapata Off-Shore Company against Unterweser Reederei, GMBH at the same time asserting claims against the Zapata Off-Shore Company in a suit filed in the High Court of Justice in London arising out

of the events of the voyage which is the subject of this suit for exoneration from or limitation of liability as well as the subject of the suit originally commenced in this Court by Zapata Off-Shore Company against the plaintiff here and the BREMEN, and again denies that the plaintiff's right to be exonerated from liability or have its liability limited is to be determined in accordance with the laws of England or Germany. Zapata Off-Shore Company says that the governing law applicable in this proceeding is the law of the United States.

Further answering the Complaint for Exoneration from or Limitation of Liability, Zapata Off-Shore Company alleges upon information and belief the following:

16. On November 3, 1967, Zapata Off-Shore Company (hereafter Zapata) entered into a written contract with Unterweser Reederei GMBH (hereinafter Unterweser) in which Unterweser agreed to tow Zapata's Drilling Rig CHAPARRAL from Venice, Louisiana, to a point near Ravenna, Italy.

17. Unterweser impliedly warranted that it would perform said towage contract in a proper, efficient and workmanlike manner.

18. Pursuant to said contract Unterweser's tug M/S BREMEN took the CHAPARRAL under tow on January 4, 1968 at a point just below Venice, Louisiana. Thereafter the M/S BREMEN and its tow proceeded into the Gulf of Mexico, heading for the Florida Straits. At all material times, Unterweser's agents, servants and employees were in complete command and control of the M/S BREMEN and the CHAPARRAL and were wholly responsible for the safe navigation of the CHAPARRAL on the aforesaid voyage.

19. On January 9, 1968, while navigating in the Gulf of Mexico, the M/S BREMEN and the CHAPARRAL encountered rough weather (which reasonably should have been anticipated by those in charge of said tug) as a result of which the CHAPARRAL sustained severe dam-

ages to its three legs, elevating mechanisms, and other parts of said drilling rig. Thereafter, the M/S BREMEN commenced towing the CHAPARRAL to the Port of Tampa, Florida.

20. Zapata and its agents, servants and employees did not cause, or contribute to cause, the aforesaid casualty and damages resulting therefrom, but on the contrary, the same were caused by the unseaworthiness of the M/S BREMEN, or the breach of Unterweser's implied warranty to perform the towage service in a proper, efficient and workmanlike manner, or the fault and negligence of Unterweser and its agents, servants and employees, and those in charge of the M/S BREMEN, among others, or a combination of one or more of the foregoing, which will be shown at the trial of this cause, to-wit:

(1) The M/S BREMEN was in charge of incompetent personnel who failed to tow the CHAPARRAL in a safe and proper manner.

(2) Those in charge of the M/S BREMEN, failed to reasonably anticipate the weather conditions to be encountered on said voyage.

(3) When danger to the CHAPARRAL was, or should have been, apparent to those in charge of the BREMEN, those in charge of the BREMEN failed to take steps to avert the danger and prevent the damages.

(4) Those in charge of the BREMEN were careless and inattentive to their duties.

(5) The BREMEN was unseaworthy in respects which contributed to the damages above mentioned.

(6) Those in charge of the BREMEN failed to tow the CHAPARRAL in depths of water in which the CHAPARRAL's legs might be lowered to the ocean bottom and the CHAPARRAL might be elevated out of the water in the event of adverse weather, despite instructions from Zapata to proceed in such depths of water.

(7) Those in charge of the M/S BREMEN failed to tow the CHAPARRAL in coastwise waters on the voyage from Louisiana toward the Florida Straits, despite instructions from Zapata so to proceed.

21. As a result of the aforesaid casualty, Zapata sustained damages in the amount of $3,500,000 as nearly as can be presently estimated, and alleges that it has a maritime lien on the tug BREMEN therefor.

22. Prior to the commencement of the voyage near Venice, Louisiana on January 4, 1968, and at all material times thereafter, Unterweser Reederei's performance of this towage was under the direct charge of the marine superintendent and port captain of Unterweser Reederei's ocean tug boat division, Captain Otto Litwinski, who arrived in the United States and commenced prevoyage preparations on or about November 28, 1967, remained in the United States continuously thereafter until he departed in charge of the riding crew on the drill rig CHAPARRAL, upon which he planned to stay until the flotilla reached its ultimate destination off the coast of Italy. The marine superintendent and port captain just mentioned was a person of managerial status whose privity and knowledge constituted the privity and knowledge of the owner, Unterweser Reederei, GMBH.

23. The BREMEN had a value as of the end of the voyage described in the Complaint in an amount substantially in excess of $1,300,000 exclusive of pending tow hire or freight.

WHEREFORE, having fully answered, Zapata Off-Shore Company prays:

1. That this Court will determine the value of the tug BREMEN as of the end of the voyage described in the Complaint herein and will require the plaintiff to increase the amount of the ad interim stipulation herein to the value determined plus pending tow hire.

2. That this Court will dismiss the Complaint for Exoneration or Limitation of Liability at the cost of the plaintiff and will decree that Zapata Off-Shore Company recover of the plaintiff and the tug BREMEN, or either of them, its damages as above alleged together with interests and costs.

BAKER, BOTTS, SHEPHERD & COATES
Esperson Building
Houston, Texas
Atorneys for Plaintiff
—and—
FOWLER, WHITE, COLLINS, GILLEN
HUMKEY & TRENAM
P. O. Box 1438, Tampa, Florida
Attorneys for Plaintiff
By *Dewey R. Villareal, Jr.*

Filed, Tampa, Fla., Aug. 28, 1968 No. 68-290-Civ-T

OBJECTION TO CLAIM AND COUNTERCLAIM

UNTERWESER REEDEREI, GmbH, Plaintiff in the captioned cause of exoneration from or limitation of liability, enters its Objection to the Claim filed in said cause by Zapata Off-Shore Company, and says as follows:

1. That the sum of $3,500,000.00 claimed by Zapata Off-Shore Company is excessive.

2. That the events and circumstances which occurred on January 9, 1968, which are fully described in Paragraph FIFTH of the Complaint for exoneration from or limitation of liability filed herein by Plaintiff, and by reference incorporated herein, were not caused by any fault, negligence or want of due care on the part of the Plaintiff herein, or of the Master, or of the Officers or Crew of M/S BREMEN, or any of them; but on the contrary, the referenced casualty for which claim of damage has been made by Zapata Off-Shore Company, was caused through the fault, negligence and incompe-

tency of Zapata Off-Shore Company, owner of drill barge CHAPARRAL, and/or by the negligence and incompetence of the employees of Claimant aboard said drill barge, and/or by reason of the unseaworthiness of said drill barge, or was due to other causes for which Plaintiff is not liable.

3. That the M/S BREMEN was, at all times material hereto, in all respects seaworthy, properly and efficiently officered, manned, supplied, equipped and furnished, well and sufficiently fitted with suitable engines, machinery, tackle, apparel, appliances and furniture, all in good order and condition and suitable for the business and voyage in which she was engaged; and, the owners of M/S BREMEN had, at the commencement of the referenced voyage, and at all times prior thereto and at all times thereafter, exercised due diligence to make M/S BREMEN in all respects seaworthy and properly and efficiently officered, manned, equipped, supplied and furnished, and well and sufficiently fitted and supplied with suitable engines, machinery, tackle, apparel, appliances and furniture.

4. That the rights, liabilities and obligations of and between Plaintiff and the Claimant, Zapata Off-Shore Company, are governed and controlled by that certain Towage Contract which was entered into between said parties on November 3, 1967, a copy of which is appended to Plaintiff's Complaint for exoneration from or limitation of liability as Exhibit D thereto, which said Contract is, by reference, incorporated herein; further, Plaintiff asserts that the rights, liabilities and obligations of and between the parties hereto, and specifically the claim of Zapata Off-Shore Company for damages in the amount of $3,500,000.00, are governed and controlled by the law of England and/or Germany, all as alleged in the above mentioned Complaint for Exoneration from or Limitation of Liability, and said allegations are incorporated herein by reference.

WHEREFORE, Plaintiff, UNTERWESER REEDEREI GmbH prays that the claim of Zapata Off-Shore

Company be dismissed, and that Plaintiff have such further or different relief as the justice of the cause may require.

COUNTERCLAIM

Plaintiff, UNTERWESER REEDEREI GmbH, counterclaims against the Claimant, Zapata Off-Shore Company, in a cause of contract, civil and maritime, within the meaning of Rule 9(h) and alleges upon information and belief as follows:

COUNT I

1. Plaintiff, UNTERWESER REEDEREI GmbH was at all times hereinafter mentioned, and is now, a German corporation having its principal place of business in Bremen, Germany, and is the sole owner of M/S BREMEN.

2. Claimant, Zapata Off-Shore Company, is a corporation organized and existing under the laws of the State of Delaware, having a principal place of business at Houston, Texas, and is the owner of the drill barge CHAPARRAL.

3. Plaintiff and Claimant entered into a Towage Contract for the tow of the drill barge CHAPARRAL from Venice, Louisiana, to Ravenna, Italy; said contract was executed in Bremen, Germany, on November 3, 1967. A copy of said contract is attached as Exhibit D to Plaintiff's Complaint for Exoneration From or Limitation of Liability which has heretofore been filed herein; said Towage Contract is incorporated by reference herein.

4. While in the Gulf of Mexico, in the course of the tow voyage, on the morning of January 9, 1968, the legs of the drill barge CHAPARRAL broke and severed the towing connections between the M/S BREMEN and said drill barge. Subsequently, as is more fully alleged hereinbelow, M/S BREMEN succeeded in reestablishing a towage connection, and towed the drill barge CHAPARRAL into the Port of Tampa, Florida. At said Port, on January 12, 1968, M/S BREMEN delivered said drill barge to its owner, Zapata Off-Shore Company.

5. By reason of the collapse of the legs of the drill barge CHAPARRAL, said drill barge was unable to continue the voyage aforesaid.

6. By reason of the collapse of the legs of said drill barge, which collapse was occasioned by the negligence of the owner of said drill barge, or of the negligence and lack of skill of the employees of said owner, or of the unseaworthiness of said drill barge, M/S BREMEN sustained damage to its towage gear as follows:

(a) 44 meters of anchor chain lost.
(b) 295 meters of Perlon towing line lost.
(c) Three steel thimbles lost.
(d) One towing shackle lost.

The foregoing items, and each of them, were new and specially purchased and assembled for the towing voyage in question; the foregoing items, and each of them, were totally lost and/or so damaged as to be of no further use. The replacement cost of the foregoing items is $6,263.08.

7. Pursuant to Paragraph 1 of the aforementioned Towage Contract, Claimant, Zapata Off-Shore Company, agreed to pay towage hire at the rate of $1,900.00 per day; towage hire was payable 14 days in advance; at the time of the aforementioned casualty towage hire was due and payable by Claimant to the Plaintiff in the total sum of $80,037.50.

8. Pursuant to Paragraph 3 of the aforementioned Towage Contract, Claimant agreed to pay to the Plaintiff the sum of $30.00 per day per man for a three-man runner crew which was to ride the drill barge CHAPARRAL; said payments were to be made at the time of the daily towage hire installment; at the time of the casualty there was due and owing by Claimant to the Plaintiff for the runner crew services the sum of $5,182.50.

9. Pursuant to Paragraph 4 of the aforementioned contract Claimant was under the duty and obligation to insure that drill barge CHAPARRAL was in a seaworthy condition for the proposed tow voyage; Claim-

ant, by reason of its failure to make the drill barge CHAPARRAL seaworthy, occasioned a breach of the contract. As a consequence of such breach, the Plaintiff has suffered the loss of the profit of the contract, and further has incurred additional expenses in connection with the delivery of the drill barge to Claimant at Tampa, Florida, and in connection with the return voyage of M/S BREMEN to Germany.

10. Plaintiff, having been initially brought before this Court by Claimant Zapata Off-Shore Company, contrary to provisions of the Towage Contract between Plaintiff and Claimant was compelled to file in this Court a Complaint for Exoneration from or Limitation of Liability as is fully described in paragraph FIFTEENTH of said Complaint. Similarly Plaintiff is compelled to file this Counterclaim against Claimant, Zapata Off-Shore Company, in this Court in order to preserve its rights. Plaintiff asserts herein that the High Court of Justice, London, England, is the proper forum for determining all rights, including the right of Plaintiff to be exonerated from or to limit liability, and its right to assert a Counterclaim and that in any event, irrespective of the forum, all rights of the parties, including Plaintiff's Counterclaim, must be determined in accordance with the law of England or alternatively the law of Germany as is fully alleged in paragraph THIRTEENTH of the aforesaid Complaint for Exoneration from or Limitation of Liability which allegations are fully incorporated by reference herein.

WHEREFORE, Plaintiff prays:

1. That it recover from Claimant, Zapata Off-Shore Company, the sum of $91,483.08, the total of the sums set forth in Paragraphs 6, 7 and 8, together with interest and costs.

2. That it recover against Claimant, Zapata Off-Shore Company, all of the damages occasioned by reason of the breach of the Towage Contract, together with interest and costs.

3. That Plaintiff may have such other, further and different relief as the justice of the cause may require.

COUNT II

As and for a second count, Plaintiff counterclaims against Claimant in a cause of salvage, civil and maritime, as follows:

1. Plaintiff realleges Paragraphs 1, 2, 3, 4, and 10 of Count I.

2. Immediately subsequent to the severing of the towing gear as hereinabove alleged, drill barge CHAPARRAL became adrift and helpless upon the seas. M/S BREMEN maneuvered to effect the rescue of all of the crew of said drill barge, and succeeded in removing the eight crew members of said drill barge, together with the three members of the runner crew from said drill barge. Thereafter, M/S BREMEN stood by said drill barge, awaiting for conditions favorable to effect the rescue of the drill barge. In the afternoon of January 9, 1968, M/S BREMEN was successful in putting one of its Officers and an able-bodied seaman aboard the drill barge. These crew members of M/S BREMEN immediately commenced to re-establish a towing connection between the drill barge and M/S BREMEN. Subsequently, M/S BREMEN was successful in putting more of its own crew members aboard said drill barge, together with some of the crew members of CHAPARRAL. The crew members of M/S BREMEN aboard CHAPARRAL succeeded in pumping the drill barge free of seawater, and in establishing a towing connection. Thereafter, M/S BREMEN commenced towing CHAPARRAL to Tampa, Florida. CHAPARRAL was safely towed to an anchorage at the entrance to Tampa Bay, and there delivered to her owners.

3. By reason of the aforesaid salvage services, which were of a meritorious nature and high order so as to entitle Plaintiff to a substantial salvage award, drill barge CHAPARRAL was rescued from imminent peril and certain disaster upon the high seas. The prompt and skillful services of M/S BREMEN prevented the complete loss of CHAPARRAL and/or precluded CHAPARRAL from being taken in tow by other rescue vessels.

4. The above mentioned salvage services were services above and beyond towage services and said salvage services were not contemplated by the Towage Contract but consisted of services outside the scope of the Towage Contract; i.e. the salvage services rendered arose from "circumstances . . . beyond actual contemplation of the towage services," as set forth in paragraph seven of the Towage Contract.

WHEREFORE, Plaintiff prays:

1. That this Court will order and adjudge that a sum of money, or a proportion of the value of drill barge CHAPARRAL be paid to the Plaintiff as compensation for the aforesaid salvage services, together with interest and costs.

2. That Plaintiff may have such other and different relief as to the Court may seem just in the premises.

Jack C. Rinard
Jack C. Rinard Of
MACFARLANE, FERGUSON, ALLISON & KELLY
P. O. Box 1531, Tampa, Florida 33601
-and-
FARIS, ELLIS, CUTRONE, GILMORE & LAUTENSCHLAEGER, Whitney Building,
New Orleans, Louisiana 70130
ATTORNEYS FOR PLAINTIFF

Filed, Tampa, Fla., Sep. 13, 1968 No. 68-290 Civ-T

REPLY TO COUNTERCLAIM

Zapata Off-Shore Company replies to the Counterclaim of Unterweser Reederei GMBH upon information and belief as follows:

AS TO COUNT I

1. Admitted.

2. Admitted.

3. Admitted except insofar as it is alleged in Para-

graph 3 of Count I that "said contract was executed in Bremen, Germany" which is denied.

4. Admitted.

5. Admitted.

6. Denied.

7. Admitted as to the rate for towage hire and insofar as it is alleged towage hire was payable 14 days in advance, otherwise denied.

8. Admitted as to the rate for the runner crew and the time payments were to be made, otherwise denied.

9. Denied.

10. Zapata Off-Shore Company admits that it initially brought Unterweser Reederei GMBH before this Court and denies the remaining allegations of Paragraph 10 of Count I of the Counterclaim.

AS TO COUNT II

1. Zapata Off-Shore Company repeats its responses to Paragraphs 1, 2, 3, 4 and 10 of Count I of this Counterclaim.

2. Admitted except insofar as Paragraph 2 of Count II alleges that the crewmembers of the M/S BREMEN aboard the CHAPARRAL succeeded in pumping the drill barge free of sea water, which is denied.

3. Denied.

4. Denied.

Further answering the Counterclaim of Unterweser Reederei GMBH, and particularly Count II thereof, Zapata Off-Shore Company says upon information and belief:

1. The services rendered by the M/S BREMEN subsequent to the severing of the towing gear, which are detailed in Paragraph 2 of Count II of the Counterclaim, were within the actual contemplation of the towage services to be rendered by the M/S BREMEN and were no more than reasonable service in reconnecting the tow line and proceeding with the tow within the contemplation and intent of Paragraph 7 on Page Three of the Towage Contract which is Exhibit "D" to the Complaint of Unterweser Reederei GMBH herein.

WHEREFORE claimant and cross-defendant Zapata Off-Shore Company prays that the Counterclaim may be dismissed at the cost of the plaintiff.

BAKER, BOTTS, SHEPHERD & COATES
Esperson Building
Houston, Texas
Attorneys for Plaintiff
-and-
FOWLER, WHITE, COLLINS, GILLEN, HUMKEY & TRENAM
P. O. Box 1438, Tampa, Florida
Attorneys for Plaintiff,
By: *Dewey R. Villareal, Jr.*

Filed, Tampa, Fla., Sep. 19, 1968 No. 68-290 Civ-T

MOTION FOR INJUNCTION

Zapata Off-Shore Company, claimant, moves the Court for an Order enjoining plaintiff herein, Unterweser Reederei GMBH, from further prosecuting or proceeding with that certain action now pending in the High Court of Justice, Probate, Divorce and Admiralty Division (Admiralty), London, England, 1968 Folio 64, styled "Unterweser Reederei GMBH, v. Zapata Off-Shore Company", pending final determination of the present action now before this Court. As grounds for this motion, Zapata Off-Shore Company respectfully shows:

1. On January 12, 1968, Zapata Off-Shore Company (hereafter "Zapata") commenced suit in this Court against Unterweser Reederei GMBH (hereafter "Unterweser") and against the Tug M/S BREMEN, seeking damages in the amount of $3,500,000 because of damages sustained by Zapata in consequence of a casualty occurring on January 9, 1968, and involving Zapata's drill rig CHAPARRAL in the course of a voyage in the Gulf of Mexico under tow of Unterweser's Tug M/S BREMEN. This suit is styled "Zapata Off-Shore Company v. M/S BREMEN and Unterweser Reederei,

GMBH," Case No. 68-21 Civ-T. A copy of Zapata's complaint is attached as Exhibit "A". Zapata's complaint alleges a "cause of breach of contract and tort", a maritime claim under the meaning of Rule 9(h), Federal Rules of Civil Procedure. Zapata's complaint alleges that on November 3, 1967, Zapata entered into a written contract with Unterweser under which the latter agreed to tow the CHAPARRAL from Venice, Louisiana, to a point near Ravenna, Italy. A copy of said contract of towage is attached as Exhibit "D" to Unterweser Reederei's complaint in this limitation proceeding, Case No. 68-290 Civ-T.

Zapata's complaint further alleges that Zapata's damages were caused by the negligence of Unterweser, its agents, servants and employees, the unseaworthiness of the Tug M/S BREMEN, and breach of implied warranty by Unterweser to perform said contract of towage in a proper, efficient and workmanlike manner. This Court obtained jurisdiction of the M/S BREMEN, by attachment, in Tampa Bay, Florida, and obtained personal jurisdiction of Unterweser by personal service on January 12, 1968. Thirty-five (35) oral depositions have been taken, hundreds of documents have been produced, and substantial trial preparations have been accomplished. These oral depositions were taken on January 19, 1968, January 23-31, 1968, February 22-25, 1968, and April 9-12, 1968.

On January 29, 1968, Unterweser filed in Case No. 68-21 Civ-T a combined motion to dismiss for lack of jurisdiction, motion to decline jurisdiction and motion to stay the further prosecution of that suit. On July 29, 1968, this Court entered a Memorandum and Order, and denying each of the motions just mentioned. A copy of this Memorandum and Order is attached as Exhibit "B".

2. On February 21, 1968, upon Unterweser's application, the High Court of Justice, Probate, Divorce and Admiralty Division (Admiralty), London, England (hereafter High Court of Justice) issued its Notice of Writ to be served out of jurisdiction, addressed to Za-

pata, Houston, Texas. This Writ contained a Notice to Zapata that Unterweser had begun an action against Zapata, and was endorsed as follows:

> "The Plaintiffs claims are for hire and other monies due under a Contract between the parties dated 3rd November, 1967 for the towage by the Plaintiffs of the Defendants' Drill Barge "CHAPARRAL" from Venice, Louisiana in the United States of America to Ravenna, Italy and damages for breach by the Defendants of such Contract."

A copy of the Notice of Writ is attached as Exhibit "C".

A purported service of this Writ was made on March 14, 1968, upon The Corporation Trust Company, Wilmington, Delaware. The Corporation Trust Company mailed said Writ to Zapata's attorneys in Houston, Texas, where it was received on March 18, 1968. Zapata engaged London solicitors to file a conditional appearance, which was entered on April 18, 1968, and thereafter contested the validity of service of process and the jurisdiction of the High Court of Justice over Zapata. On July 4, 1968, the High Court of Justice denied Zapata's motions contesting the validity of service of process and that Court's jurisdiction. London solicitors for Zapata appealed from this ruling and on July 23, 1968, the Court of Appeals, London, dismissed the appeal.

On or about June 27, 1968, Unterweser caused to be served upon Zapata's London solicitors a Statement of Claim, a copy of which is attached as Exhibit "D". The Statement of Claim alleges breach of the towage contract dated November 3, 1967, between Zapata and Unterweser. Unterweser alleges that the cause of the collapse of the three legs of the CHAPARRAL was the failure of Zapata to have the CHAPARRAL in a seaworthy condition for the tow as required by Clause 4 of the towage contract. By reason thereof, Unterweser claims it was prevented from fulfilling the contract. Unterweser seeks to recover from Zapata (1) the sum of $6,263.08 for losses of, or damages to, certain of the towage gear of the M/S BREMEN; (2) the sum of

$80,037.50 for towage hire allegedly due; (3) the sum of $5,182.50 for runner crew services, and (4) unspecified sums for loss of profits under the contract, and additional expenses in connection with the delivery of the CHAPARRAL to Tampa, Florida, and the return voyage of the M/S BREMEN to Germany. London solicitors for Zapata have advised that a response to this Statement of Claim is not due before October 1, 1968. Thus, issue has not been joined in the English proceeding, and no depositions or pre-trial discovery of any kind have been undertaken therein.

3. This limitation proceeding was commenced by Unterweser on July 2, 1968. Unterweser has invoked this Court's jurisdiction, and seeks to have this Court exonerate Unterweser from any liability to Zapata or any other person arising out of the voyage upon which the casualty to the CHAPARRAL occurred or, alternatively, to limit Unterweser's liability.

Unterweser has filed an ad interim stipulation in lieu of surrendering the M/S BREMEN, in the total amount of $1,390,000, of which $1,300,000 represents the alleged value of the M/S BREMEN, and $90,000 represents the amount of tug hire (pending freight) allegedly owed by Zapata to Unterweser under the towage contract.

Unterweser has alleged, in this limitation proceeding, that the casualty and damages to the CHAPARRAL and the damages to the BREMEN's tow line were not "due to any breach of contract, default, fault, design, neglect or want of care on the part of Plaintiff (Unterweser) or those in charge of the M/S BREMEN". Unterweser has further alleged that " . . . the casualty was caused through the fault, negligence, carelessness and incompetency of the owner (Zapata) and/or those in charge of and controlling the said drill barge CHAPARRAL and/or the unseaworthiness of CHAPARRAL . . . ". *Unterweser alleges it "desires to contest its liability and the liability of the M/S BREMEN . . . and particularly any losses and damages incurred by the owners (Zapata) of drill barge CHAPARRAL".* (Emphasis added).

On July 5, 1968, this Court, at the request of Unterweser, entered in these limitation proceedings a Restraining Order providing ". . . that the filing, commencement and prosecution, in any Court whatever, of any and all actions, suits or legal proceedings . . ." in respect of anything arising out of the facts and circumstances set forth in the Complaint for Limitation be restrained, with the proviso that this Court reserved jurisdiction over Case No. 68-21, the suit first filed, for the sole purpose of entering its ruling on Unterweser's motions to dismiss, decline jurisdiction and/or stay further prosecution of Case No. 68-21.

On July 8, 1968, Zapata filed its claim in this proceeding and on July 24, 1968, Zapata filed its answer herein, thereby joining issue. In its answer, Zapata has alleged, as it did in its complaint in Case No. 68-21 Civ-T, that the losses sustained by Zapata in consequence of the casualty involving the CHAPARRAL were not caused by any negligence on Zapata's part or any unseaworthiness of the CHAPARRAL, but such losses were caused by the unseaworthiness of the M/S BREMEN, Unterweser's breach of implied warranty to perform the towage contract in a proper, efficient and workmanlike manner or the negligence of Unterweser, its agents, servants and employees.

4. On or about August 28, 1968, Unterweser filed in this limitation proceeding its objection to Zapata's claim in said limitation proceeding. In addition Unterweser filed a counterclaim affirmatively seeking to recover from Zapata the same losses and damages Unterweser seeks to recover from Zapata in its London suit.

In its objection to Zapata's claim, Unterweser alleges the casualty in question was not caused by any fault or negligence on the part of Unterweser, or of the Master, officers or crew of the M/S BREMEN, but to the contrary, alleges said casualty was caused by the fault or negligence of Zapata, and its employees on board the CHAPARRAL, and/or the unseaworthiness of the CHAPARRAL.

In Count I of its counterclaim against Zapata, Unterweser reiterates its allegations of Zapata's negligence and unseaworthiness of the CHAPARRAL, and further alleges that Zapata breached the contract of towage in failing to make the CHAPARRAL seaworthy. Unterweser seeks to recover from Zapata the same sums for tug hire allegedly due, damage to the M/S BREMEN's tow line, runner crew services, lost profits, and additional expenses in connection with the delivering the CHAPARRAL to Zapata at Tampa and the return voyage of the M/S BREMEN to Germany as are claimed in the London suit.

In addition, in Count II of its counterclaim, Unterweser alleges a cause of action against Zapata for salvage, and asks the Court to award Unterweser an unspecified sum as compensation for alleged salvage services rendered to the CHAPARRAL.

On September 13, 1968, Zapata filed its reply to Unterweser's counterclaim, thereby joining issue.

5. In this limitation proceeding this Court has jurisdiction of the parties, Unterweser and Zapata, and the subject matter of the claims asserted by each party against the other. The same issues of liability are presented in this limitation proceeding as are involved in the London proceeding, i.e., whether Unterweser or Zapata, or both, breached the contract of towage, whether Unterweser or Zapata, or both, were guilty of negligence proximately causing the casualty of January 12, 1968, and whether the M/S BREMEN or the CHAPARRAL, or both, were unseaworthy. In addition, and only in the counterclaim in this limitation proceeding Unterweser has alleged a claim for salvage against Zapata arising out of the voyage in question. This Court, of course, has jurisdiction of the salvage claim. Unterweser's claim for salvage is not asserted in its London suit.

6. This Court has the power and authority to enjoin Unterweser from prosecuting and further proceeding with its suit against Zapata in the High Court of Justice in London.

7. This Court should exercise its power and authority to enjoin Unterweser from prosecuting or proceeding with its suit against Zapata in the High Court of Justice on the following equitable grounds:

A. In addition to providing a concourse for the adjudication of all claims including Zapata's against Unterweser, this proceeding also provides the proper forum for the adjudication of Unterweser's claim against Zapata. The objective of the limitation proceeding is to effect a complete and just disposition of all controversies arising out of the events of the voyage with respect to which exoneration or limitation is sought. This avoids needless multiplicity of litigation. To accomplish this end, justice would best be served by this Court's enjoining Unterweser from further prosecuting its claim against Zapata in the London suit pending final determination of the proceedings in this Court.

B. This Court has priority over the High Court of Justice because this Court in Case No. 68-21 Civ-T *first* acquired jurisdiction of the parties, the subject matter, and the issues in controversy between Zapata and Unterweser arising out of the casualty and their contract of towage. Zapata, having first brought action in this Court, should be free from the vexation of concurrent litigation over the same subject matter, and an injunction should be issued enjoining the prosecution of Unterweser's subsequently filed London suit to prevent the economic waste involved in duplicating litigation which would have an adverse effect on the prompt and efficient administration of justice by this Court.

C. To allow Unterweser to proceed with the prosecution of its suit in the High Court of Justice would subject Zapata to highly unnecessary, extraordinary and burdensome expense, and great inconvenience, including the transportation of its witnesses and documents from the Gulf Coast area of the United States to London, England, and including substantial

duplication of legal services of Zapata's American counsel in the Tampa proceedings and Zapata's English solicitors and barristers in the London suit.

D. To allow Unterweser to proceed with its suit in the High Court of Justice would invite conflicting judgments involving the same parties and the same subject matter because the laws of the United States are markedly different from the laws of England with respect to the rights and liabilities of Zapata and Unterweser in the controversies arising out of the voyage in question.

WHEREFORE, Zapata Off-Shore Company prays that this Court enter an Order enjoining Unterweser Reederei GMBH from further prosecuting or proceeding with its suit in the High Court of Justice, Probate, Divorce and Admiralty Division (Admiralty), 1968 Folio 64, styled "Unterweser Reederei GMBH v. Zapata Off-Shore Company" pending final determination of this action.

BAKER, BOTTS, SHEPHERD & COATES
1600 Esperson Building
Houston, Texas 77002.
By *James K. Nance*
James K. Nance
FOWLER, WHITE, COLLINS, GILLEN, HUMKEY & TRENAM
P. O. Box 1438,
Tampa, Florida 33601.
By *Dewey R. Villareal, Jr.*
Dewey R. Villareal, Jr.
Attorneys for Zapata Off-Shore Company

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE MIDDLE DISTRICT OF FLORIDA TAMPA DIVISION

ZAPATA OFF-SHORE COMPANY,

Plaintiff,

vs. No. 68-21 Civ-T

M/S BREMEN and UNTERWESER REEDEREI GMBH, filed 1-11-68

Defendant.

COMPLAINT

The Complaint of Zapata Off-Shore Company against the M/S BREMEN, its engines, tackle, etc., and all persons intervening for their interest therein, and against Unterweser Reederei GMBH, in a cause of breach of contract and tort, a maritime claim within the meaning of Rule 9 (h), Federal Rules of Civil Procedure, as follows:

I.

At all material times herein, plaintiff was and is now a corporation organized under the laws of the State of Delaware, with its principal office in Houston, Texas, and was and now is owner of the drilling Rig CHAPARRAL, which, at the time of the casualty herein described, was in all respects seaworthy.

II.

At all material times herein, the defendant, Unterweser Reederei GMBH, hereafter "Unterweser", was a company or corporation or a legal entity organized and existing under the laws of West Germany, with its principal office in Bremen, Germany. Said defendant was and is now the owner and operator of the eangoing tug M/S BREMEN.

EXHIBIT A

On November 3, 1967, plaintiff entered into a written contract with defendant Unterweser under which said defendant agreed to tow the Drilling Rig CHAPARRAL from Venice, Louisiana, to a point near Ravenna, Italy.

Defendant impliedly warranted that it would perform said towage contract in a proper, efficient, and workmanlike manner.

Pursuant to said contract, defendant's tug M/S BREMEN took the CHAPARRAL under tow on January 4, 1968, at a point just below Venice, Louisiana, and thereafter proceeded into the Gulf of Mexico heading for the Florida Straits. At all material times, defendant's agents, servants and employees were in complete command and control of the M/S BREMEN and the CHAPARRAL and were wholly responsible for the safety of the CHAPARRAL on the aforesaid voyage.

On January 9, 1968, while navigating in the Gulf of Mexico, the M/S BREMEN and the CHAPARRAL encountered rough weather (which should have reasonably been anticipated by those in charge of said tug) as a result of which the CHAPARRAL sustained severe damages to its three legs, elevating mechanisms, and other parts of said drilling rig. Thereafter, the M/S BREMEN commenced towing the CHAPARRAL to the Port of Tampa, Florida.

The M/S BREMEN is now or will be during the pendency of process herein within the territorial jurisdiction of this Court.

IV.

The plaintiff and its agents, servants and employees did not cause, or contribute to cause, the aforesaid casualty and damages resulting therefrom, but on the contrary, the same were caused by the unseaworthiness of the M/S BREMEN,

or the breach of defendant's implied warranty to perform the towage service in a proper, efficient and workmanlike manner, or the fault and negligence of the defendant and its agents, servants and employees, and those in charge of the M/S BREMEN, among others, or a combination of one or more of the foregoing, which will be shown at the trial of this cause, to-wit:

(1) The M/S BREMEN was in charge of incompetent personnel who failed to tow the CHAPARRAL in a safe and proper manner.

(2) Those in charge of the M/S BREMEN failed to reasonably anticipate the weather conditions to be encountered on said voyage.

(3) When danger to the CHAPARRAL was, or should have been, apparent to those in charge of the BREMEN, those in charge of the BREMEN failed to take steps to avert the danger and prevent the damages.

(4) Those in charge of the BREMEN were careless and inattentive to their duties.

(5) The BREMEN was unseaworthy in respects which contributed to the damages above mentioned.

V.

As a result of the aforesaid casualty, plaintiff has sustained, or will sustain, losses for physical damages to the drilling rig CHAPARRAL and loss of use thereof in the amount of $3,500,000.00 as nearly as can be presently estimated, and alleges that it has a maritime lien on the tug BREMEN therefor. Plaintiff reserves the right to amend its complaint and increase the amount of the damages should the same be necessary.

The premises of this complaint are true and correct and within the admiralty and maritime jurisdiction of the United States and this Court.

WHEREFORE, plaintiff prays

1. That process in due form of law according to the rules and practice of this Honorable Court in causes of admiralty and maritime jurisdiction may issue against the German Motor Vessel BREMEN, her engines, tackle, apparel, etc. citing all persons claiming any interest therein to appear and answer on oath all and singular the matters aforesaid, and

2. That process in due form of law, according to the rules and practice of this Honorable Court, in causes of admiralty and maritime jurisdiction, may issue against the defendant Unterweser Reederei GMBH, citing it to appear and answer on oath all and singular the matters aforesaid, and

3. Providing that said defendant Unterweser Reederei GMBH cannot be found within this district, that all goods and chattels belonging to it within this district may be attached by process of foreign attachment to the amount of $2,000,000, the sum sued for in the complaint, together with interest, costs and the disbursements of the plaintiff, and

4. That this Honorable Court will order, adjudge and decree that the said defendants, and each of them, are liable to the plaintiff, and that the said defendants, and each of them, pay to the plaintiff the damages sustained by the plaintiff together with interest thereupon and the plaintiff's costs and disbursements herein, and

5. That the said Motor Vessel BREMEN may be condemned and sold to pay the demands aforesaid, with interest and costs, and that the plaintiff shall have such other and further relief in the premises as in law and justice it may be entitled to receive.

ZAPATA OFF-SHORE COMPANY, Plaintiff

By BAKER, BOTTS, SHEPHERD & COATES
1600 Esperson Building
Houston, Texas 77002

By: James K. Nance
James K. Nance

-and-

FOWLER, WHITE, COLLINS, GILLEN,
HUMKEY & TRENAM
P. O. Box 1438, Tampa, Florida

By: _____

Its Attorneys

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ZAPATA OFF-SHORE COMPANY,

Plaintiff,

vs.

M/S BREMEN and UNTERWESER REEDEREI, GmbH,

Defendants

No. 68-21-Civ-T

MEMORANDUM AND ORDER

Defendant, a German corporation, appearing in its own behalf and as owner of the ocean-going tug M/S BREMEN, has moved the Court to decline jurisdiction and dismiss a maritime claim in a cause of breach of contract and tort brought by Plaintiff, a Delaware corporation, the owner of the Drill Barge (Rig) CHAPARRAL, or alternatively to decline jurisdiction or to stay proceedings.

The claim grows out of a casualty which occurred during performance of a towage contract executed in Bremen, Germany. By the contract Defendant agreed to tow Plaintiff's drill barge from Venice, Louisiana, to Ravenna, Italy. In course of the tow voyage, the drill barge suffered a casualty and was towed into Tampa, Florida, by the Defendant's tug. On arrival at Tampa, Florida, Plaintiff caused the tug to be arrested by the United States Marshal pursuant to practice in admiralty proceedings.

Defendant urges that a paragraph of the Towage Contract, which provides:

> "Any dispute arising must be treated before the London Court of Justice"

defeats the jurisdiction of this Court and buttresses its position by seeking application of the doctrine of forum non conveniens. Its first contention is opposed by Carbon Black

Export, Inc. v. The Monrosa, 254 F.2d 297 (5 C. 1958), affirmed, 359 U.S. 999 (1959).

Even Wm. H. Muller & Co. v. Swedish American Line, Ltd., 224 F.2d 806 (2 C. 1955), which under different facts held otherwise, recognizes that a similar clause does not defeat jurisdiction and held that jurisdiction should be declined only after a finding that the agreement is reasonable in a particular case.

Helpful criteria to be considered are given in Mobile Tankers, S.A. v. Mene Grande Oil Co., 363 F.2d 611 (3 C. 1966), cert. denied, 385 U.S. 945 (1966):

> "The factors which must be considered and weighed include the following: libelant's choice of forum; status of the parties; convenience of parties and witnesses; access to sources of proof; cost of obtaining the attendance of willing witnesses; possibility of a view of the premises, if appropriate; relative advantages and obstacles to a fair trial; and, possible difficulty in the application of foreign law. Unless 'the balance is strongly in favor of the [respondent], [the libellant's] choice of forum should rarely be disturbed.' Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947)."

The citizenship of the parties has been given. Plaintiff chose and obtained the jurisdiction of this Court. The prelude, including a partial performance, alleged casualty and aftermath here all occurred along or near the Gulf Coast of the United States of America and within or adjacent to the jurisdiction of the judicial circuit of which this Court is a part.

A great majority, if not all, of the witnesses are or were in the United States, including an alleged forty potential witnesses residing permanently here. Members of the Bar of this Court have spent considerable time in the investigation and preparation of the trial of this case, 33 oral depositions have been taken, including all of the officers and members of the crew of Defendant's tug and the Defendant's riding crew on Plaintiff's drill barge. Defendant itself has

taken oral depositions and with the aid of this Court obtained production of documents, plans and other data.

Plaintiff has made an undisputed showing that English courts apply different tests and rules of liability in cases of this type than do many of the courts of this country.

The contract is printed in English and in any event interpreters would probably have to be used in taking testimony of the German crew, whether this cause is tried here or in England.

Defendant has not suggested and there is no showing that American courts are not capable of adjudicating this case fairly and justly. The balance of conveniences here is not strongly in favor of Defendant and Plaintiff's choice of Forum should not be disturbed.

For the reasons given, Defendant's Motions to Dismiss for Lack of Jurisdiction, Requesting the Court to Decline Jurisdiction on Grounds of Forum Non Conveniens, and alternatively to stay further prosecution of these proceedings pending adjudication in England be, and they are each, DENIED.

DONE and ORDERED at Tampa, Florida, this 29th day of July, 1968.

UNITED STATES DISTRICT JUDGE

1968 —XXG—No. Folio 64

In the High Court of Justice

PROBATE DIVORCE & ADMIRALTY DIVISION

(ADMIRALTY)

A. 9. Between UNTERWESER REEDEREI GESELLSCHAFT

mit BESCHRANKFER HAFTUNG

PLAINTIFFS

AND

ZAPATA OFF-SHORE COMPANY

DEFENDANTS

Notice of Writ to be served out of Jurisdiction (App. A, No. 6)

The Solicitors' Law Stationery Society Limited
109–112 Fleet Street E.C.4
3 Bucklersbury, E.C.4
49 Chalford Row, W.C.1
4 Victoria Street, S.W.1
10 Hanover Street, W.1
56–59 Newhall Street Birmingham, 3
31 Charles Street Cardiff CF1 4EA
19 & 21 North John St. Liverpool, 2
98–99 John Dalton St. Manchester, 2

To Zapata Off-Shore Company

of 2000 Southwest Tower, Houston, Texas 77002 in the United States of America

Take Notice that

Unterweser Reederei Gesellschaft mit Beshrankfer Haftung

of Blumenthalstrasse 15/16, 28, Bremen 1 in the German Federa Republic

have begun an action against you Zapata Off-Shore Company

in Her Majesty's High Court of Justice in England by Writ of Summons dated the 21st day of February 1968; which Writ is indorsed as follows :—

Copy the Indorsements.

The Plaintiffs claims are for hire and other monies due under a Contract between the parties dated 3rd November, 1967 for the towage by the Plaintiffs of the Defendants' Drill Barge "CHAPARRAL" from Venice, Louisiana in the United States of America to Ravenna, Italy and damages for breach by the Defendants of such Contract.

The Plaintiffs are a Company incorporated outside the Scheduled Territories as defined by the Exchange Control Act, 1947 and who carry on business at the address shown below.

This Writ was issued by Richards, Butler & Co. of Stor House, 128/140, Bishopsgate, London, E.C.2. Solicitors for the said Plaintiffs who are a Company incorporated according to the laws of the German Federal Republic and who carry on business at Blumenthalstrasse 15/16, 28, Bremen 1.

EXHIBIT C

and you are required within 17 days after receipt of this notice, inclusive of the day of receipt, to cause an appearance to be entered for you in the said Court to the said action, and in default of your so doing the said

Unterweser Reederei Gesellschaft mit Beschränkter Haftung

may proceed therein and judgment may be given in your absence.

You [may enter an appearance ~~in person~~ or by a Solicitor either (1) by handing in the appropriate forms, duly completed, at the ~~Central Office~~ [*or* the Admiralty Registry], Royal Courts of Justice, Strand, London, W.C.2 [~~or the Principal Probate Registry, Somerset House, Strand, London, W.C.2~~], or (2) by sending them to that office by post.

* This paragraph must be deleted if Writ is not indorsed with statement of claim.

* ~~[If you enter an appearance, then, unless a summons for judgment~~ is served on you in the meantime, you must also ~~serve a defence~~ on the Solicitor for the Plaintiff ~~within 14 days~~ after the last day of the time limited for ~~entering an appearance~~, otherwise judgment may be entered ~~against you without notice.]~~

(Signed) Richards Butler & Co

of Stone House, 128/140, Bishopsgate, London, E.C.2.

~~[Agent for~~

~~of~~

]

Solicitor for the said Plaintiffs.

This notice was served by me at

on the ~~Defendant~~

on , the day of 19 .

Indorsed the day of 19 .

(Signed) _____

(Address) _____

GREAT BRITAIN AND NORTHERN IRELAND
LONDON, ENGLAND
EMBASSY OF THE UNITED STATES OF AMERICA } ss:

I, Frank J. Barrett Vice Consul of the United States of America residing at London, England, duly commissioned and qualified, do hereby certify that

JAMES MALCOLM WAUGH

whose signature and official seal are respectively subscribed and affixed to the annexed certificate, was on the date of the signing thereof a Notary Public at London, England, duly authorized to perform notarial acts, duly appointed and qualified, to whose official acts faith and credit are due; that I have compared the signature of said

JAMES MALCOLM WAUGH

on the annexed certificate with a specimen of his signature filed in this Embassy; that I believe his signature to be genuine; that I have compared the impression of the seal affixed thereto with a specimen thereof filed in this Embassy, and that I believe the impression of the seal upon the said original annexed certificate to be genuine.

In witness whereof I have hereunto set my hand and affixed the seal of the Consular Service of the United States of America at London, England, this twelfth day of August in the year of Our Lord one thousand nine hundred and sixty-eight.

Frank J. Barrett
Vice Consul of the United States of America at London, England.

Service Receipt No. A3778754

Tariff Item No. 48

Fee: $2.50 = 21s. 0d.

~~No fee prescribed.~~

IND/125
Jan.1968

EXHIBIT D

Cheeswright, Mauby & Co.
INC. DUFF WATTS & CO.

A. J. BURGESS M.A. (Oxon.)
J. MALCOLM WAUGH

B. G. C. BROOKS
J. D. G. SAUL M.A. (Oxon.)

NOTARIES PUBLIC
COMMISSIONERS FOR OATHS
AND
TRANSLATORS

5 FENCHURCH STREET
LONDON, E.C.3.

TELEPHONES
01-623 1357
(3 LINES)

CABLES
UNICNOT LONDON, E.C.3

AND AT
COLCHESTER
PHONE 0206 78167
AND
NORTHWOOD
TELEPHONE
NWOOD 21148

TO ALL TO WHOM these presents shall come, I JAMES MALCOLM . WAUGH of the City of London Notary Public by Royal Authority duly admitted and sworn .DO HEREBY CERTIFY that the photostatic Copy hereunto annexed is a true copy of the Original Document of which it purports to be a copy I having carefully collated and compared the said Copy with the said Original and found the same to agree therewith.

IN FAITH AND TESTIMONY whereof I the said Notary have subscribed my name and set and affixed my seal of Office at London aforesaid this t w e l f t h day of August, One thousand nine hundred and sixty-eight.

J. Malcolm Waugh
Not. Pub.

IN THE HIGH COURT OF JUSTICE 1968 Folio 64

PROBATE, DIVORCE & ADMIRALTY DIVISION

(ADMIRALTY)

B E T W E E N : UNTERWESER REEDEREI GESELLSCHAFT MIT BESCHRANKTER HAFTUNG

Plaintiffs

- and -

ZAPATA OFF-SHORE COMPANY Defendants

STATEMENT OF CLAIM

1. By a written contract dated 3rd November 1967 the Plaintiffs (thereinafter called "URAG") undertook that their ocean-going tug "Bremen" would tow the Defendants' (thereinafter called "Owners") oil drill barge "Chaparral" (thereinafter called the "object") from Venice, Louisiana to a point near Ravenna, Italy, as destined by the Defendants.

2. It was expressly provided by the said contract (inter alia):-

Clause 1

(a) Price

The "Owners" shall pay for such operation the sum of U.S.$35,000 - (say thirty-five thousand U.S. dollars), and a daily hire rate of U.S.$1,900 (say nineteen hundred U.S. dollars) for all time used by the tug counting from time of arrival at port of departure of the tow (Venice/La.) not earlier than December 1st, 1967, until delivery of the "object" at Ravenna.

(b) Conditions of Payment

U.S.$35,000 - on arrival of the tug at Venice, Louisiana.

Daily hire to be paid in instalments of 14 days in advance; first instalment being due and payable before the tow leaves Venice/La. Balance, if any, to be settled on delivery of the "object" at destination.

3. Towing Gear and Runner Crew

.....URAG to provide a runner crew for the "object", consisting of one marine superintendent and two seamen... "owners" to pay URAG U.S.$30 per man and per day, counting from the departure from Bremerhaven until arrival at Ravenna. Payment to be effected together with daily hire instalments as per clause 1(b).

4. Seaworthiness

"Owners" to have the "object" in a seaworthy condition for the proposed towage and an approved certificate to such effect issued by a competent and approved surveyor, is to be provided by "Owners" to URAG or their Master on arrival of the tug at the port of departure, failing which "Owners" to pay URAG daily hire rate as per Clause 1 for the delay involved.

3. The said contract also incorporated the General Towage Conditions which provide by Clause 2(a):-

For damages suffered by the tug the Owners of the towed object are responsible unless they prove that those damages are caused by the default of the tug.

The Plaintiffs will at the trial refer to the said contract for its full terms and effect.

4. Pursuant to the contract, the "Bremen" arrived in New Orleans on 9th December 1967 at 21.00 hours. On 3rd January 1968 at 15.30 she arrived at Venice, Louisiana,

and on or about 5th January 1968 the towage commenced from a point in the Mississipi below Venice. From the time when the "Bremen" arrived in New Orleans until the commencement of the towage she was at all times at the disposal of the Defendants and was ready to commence the voyage as soon as the "Chaparral" had been fully prepared for being towed. Accordingly the Plaintiffs will say that the lump sum payment of $35,000 was due and the hire commenced from the time when the Bremen arrived at New Orleans.

5. On 9th January 1968, while the tow was proceeding through the Gulf of Mexico, the bow leg of the "Chaparral" broke off at a point just above the jacking system, and fell onto the towing lines connecting the "Chaparral" to the "Bremen", thereby causing damage to the towing gear of the "Bremen". Shortly afterwards the port and starboard legs also broke off and fell into the sea. In the premises it was impossible to continue the towage of the "Chaparral" to Ravenna and accordingly she was towed by the "Bremen" into the port of Tampa, Florida.

6. In the premises the following sums are due to the Plaintiffs under the contract, but the Defendants have failed to pay the same or any part thereof:-

(a) Under Clause 1

(i) Lumpsum payment due on arrival: $35,000

(ii) Hire at $1,900 per day commencing on 9th December 1967 at 21.00 and due by instalments of 14 days in advance:

Due on 10.12.67 in respect of period from 21.00 on 9.12.67 up to and including 23.12.67 .....$26,837.50

Due on 24.12.67 .....$26,600

Due on 7.1.68 .....$26,000

$80,037.50

b) Under Clause 3

Runner crew of 3 men aboard "Chaparral"; $30 per men and day payable by instalments of 14 days in advance, together with hire. The Plaintiffs will say that such payments have accrued from 24th November 1967 at 10.00, that being the time when the "Bremen", proceeding at her normal free running speed, would have had to leave Bremerhaven in order to arrive at the port of departure by December 9th 1967 at 21.00;

Due on 10.12.67 in respect of period from 10.00 on 24.11.67 up to and including 23.12.67	$2,662.50
Due on 24.12.67	$1,260
Due on 7.1.68	$1,260
	$ 5,182.50

(c) Under Clause 2(a) of the General Towage Conditions

As a result of the damage which occurred to the towing gear of the "Bremen" it was necessary to replace the following items:

(i) Anchor chain, length 15m.

(ii) Anchor chain, length 27m.

(iii) Perlon towing line, length 40m.

(iv) Perlon towing line, length 35m.

(v) Perlon towing line, length 220m.

(vi) 3 Steel thimbles for perlon towing line

(vii) Towing shackle.

The cost of replacement of such items amounted to $6,263.08 /particulars of which are delivered herewith to the Defendants/. Alternatively the Plaintiffs are entitled to recover the aforesaid amount as damages for the breach of contract specified in paragraph 8 hereof.

7. The Plaintiffs will contend in the alternative that it was an implied term of the contract that the Defendants would make the "Chaparral" ready in all respects to commence the voyage on or about 1st December 1967. If the "Chaparral" had been ready on or about 1st December as aforesaid, the Brenen would have arrived at Venice, Louisiana on or about 9th December and the hire would have commenced forthwith. In the premises the Plaintiffs are entitled to hire under Clause 1 and payments under Clause 3 of the contract in respect of the period between 21.00 on 9th December 1967 and 15.30 on 3rd January 1968, less an allowance for steaming time between New Orleans and Venice, as damages for breach of such implied term.

8. Further or alternatively, in breach of the Defendants' obligations under Clause 4 of the contract, the "Chaparral" was at all material times unseaworthy.

PARTICULARS

1. The legs of the "Chaparral" were not sufficiently strong throughout their length, and in particular in the vicinity of the jacking systems where the legs were connected to the hull, to enable them to withstand the stresses imposed by the normal motion of the hull of the "Chaparral" during the voyage.
2. The "Chaparral" was not fitted with any locking or bracing device for securing the legs by fastening them together above the level of the deck and thereby reducing such stresses.

9. By reason of the aforesaid breach of contract the Plaintiffs have suffered loss of profit being the additional hire and other payments which they would have earned under the contract less the additional expenses of earning the same, and have further incurred expenses by reason of the damage to the

towing gear of the "Bremen", her call at Tampa and her return voyage from Tampa to Dover in ballast.

AND THE PLAINTIFF CLAIMS:-

1. Under paragraph 6 hereof: £52,703.7. being the total of the amounts claimed under paragraph 6 hereof, namely U.S.$126,488.08, converted into £ sterling at the rate of U.S.$2.40 = £1.

2. Judgment against the Defendants for the amount of damage sustained by the Plaintiffs by reason of the breaches of contract specified in paragraphs 7 and 8 hereof, and a reference to the Registrar and Merchants for the assessment of such damage.

3. Interest.

4. Costs.

JULIAN COOKE

SERVED this 21st day of June 1968 by RICHARDS, BUTLER & CO., Stone House, Bishopsgate, E.C.2. Solicitors for the Plaintiffs.

Filed, Tampa, Fla. Sept. 19, 1968 No. 68-290 Civ-T

MEMORANDUM OF ZAPATA OFF-SHORE COMPANY IN SUPPORT OF ITS MOTION FOR INJUNCTION AND MEMORANDUM OF LAW IN SUPPORT THEREOF

STATEMENT OF FACTS

Zapata Off-Shore Company, by and through its attorneys of record, says that the following facts are true in connection with its Motion for Injunction:

1. Zapata Off-Shore Company ("Zapata") is a citizen of the United States, being duly incorporated under the laws of the State of Delaware, with its principal office and place of business located in Houston, Texas.

2. The Drill Barge (Rig) "CHAPARRAL" is a vessel of American registry. At all material times it was wholly owned by Zapata.

3. Unterweser Reederei GMBH ("Unterweser") is a German corporation, with its principal office and place of business in Bremen, Germany.

4. The M/S BREMEN is an ocean-going tug of German Registry, and Unterweser was its owner at all times material herein.

5. The causes of action in (a) "Zapata Off-Shore Company v. M/S BREMEN and Unterweser Reederei GMBH", Case No. 68-21 Civ-T, (b) this limitation proceeding filed by Unterweser, both now pending in this Court, and (c) "Unterweser Reederei, GMBH, v. Zapata Off-Shore Company", now pending in the High Court of Justice, Probate, Divorce and Admiralty Division (Admiralty), 1968 Folio 64, London, England, arise out of a voyage of Zapata's Drill Barge CHAPARRAL in tow of Unterweser's tug BREMEN during which the CHAPARRAL sustained a casualty on January 9, 1968 in the Gulf of Mexico. Thereafter the BREMEN towed the CHAPARRAL to Tampa, Florida, arriving January 12, 1968. This towage was being performed under a written contract between Zapata and Unterweser dated November 3, 1967.

6. (a) There were seven employees of Zapata and one employee of a catering company on board the CHAPARRAL during the voyage. They are American citizens whose permanent addresses are in the Gulf Coast area of the United States. They are Oscar Willard, Wilton Johnson, Oscar W. Paul, Kenneth Price, Billy C. Burke, Earl B. Richie and Nolan R. Gamble (all employees of Zapata), and L. J. Fruge (catering company employee), all of whose depositions have been taken in Case No. 68-21 Civ-T (but not in the London proceeding). Their testimony is material on the plans and preparations for and the events of the voyage in question, the seaworthiness of the CHAPARRAL, or both.

(b) In addition to the foregoing, the following employees of Zapata are material witnesses:

(1) Hoyt Taylor, Vice President and Chief Engineer.

(2) L. V. Whittington, Manager of Operations.

(3) Wiley C. Fenner, Senior Drilling Superintendent.

(4) James Booth, Engineer.

These four persons reside in Houston, Texas. Their testimony is material on the plans and preparations for the voyage in question and on the question of the seaworthiness of the CHAPARRAL.

(5) Noel Thompson, resident surveyor for Salvage Association, London, who resides in New Orleans, Louisiana.

(6) Captain John H. W. Hellendoorn, staff marine surveyor for Salvage Association, London, who resides in New Jersey.

These two men participated in the pre-voyage survey of the CHAPARRAL. Their testimony is material on the plans and preparations for the voyage in question and on the question of the seaworthiness of the CHAPARRAL.

(7) A representative of Breit Engineering Company of New Orleans, Louisiana, a naval architectural firm, who has knowledge of the stability of the CHAPARRAL.

(8) Joseph Tynan, marine surveyor, resident of New Orleans, Louisiana, who made a post-casualty damage survey of the CHAPARRAL at the request of Zapata.

(9) Sam Bryan of Shilstone Testing Laboratories, metallurgist residing in Houston, Texas, who has participated in certain metallurgical testings of the damaged portions of the three legs of the CHAPARRAL.

(10) Zapata expects to call several representatives of R. G. LeTourneau, Inc., which built the CHAPARRAL and delivered it to Zapata in the Spring of 1966, to testify concerning the construction of the CHAPARRAL.

(11) Zapata expects to call certain workmen of R. G. LeTourneau, Inc., who carried out work on the CHAPARRAL in preparation for the voyage in question, to testify concerning such work and the seaworthiness of the rig.

7. The following persons were engaged by Unterweser, following the casualty, and they may reasonably be expected to be called as witnesses by Unterweser:

(a) Rush Johnson and J. R. Bencal, two marine surveyors, engaged by Unterweser to survey the post-casualty damages to the CHAPARRAL. They reside in Houston, Texas.

(b) Representatives of Pittsburgh Testing Laboratories at Tampa, Florida, and Pittsburgh, Pa., engaged by Unterweser to perform certain metallurgical tests on parts of the damaged legs of the CHAPARRAL. These testing experts reside in Florida and Pennsylvania.

(c) Unterweser employed a photographer to take photographs of the damaged condition of the CHAP-

ARRAL. He resides in Tampa, Florida.

(d) Unterweser engaged Thomas A. Addison, surveyor, to survey the damaged towing gear of the M/S BREMEN. He resides in Tampa, Florida.

(e) Harry W. Reineke, marine surveyor and naval architect in the City of New Orleans, Louisiana. He was employed by Unterweser's representatives to examine the M/S BREMEN for valuation purposes. His affidavit as to value appears as Exhibit "A" to Unterweser's limitation complaint in Case No. 68-290 Civ-T.

8. Other witnesses whose testimony is only available in the United States pertaining to the damages sustained by Zapata are representatives of:

(a) Davis Transport, Inc., of Houston, Texas.

(b) Bailey B. Line, Inc., of Metairie, Louisiana.

(c) Construction Services, Inc., of Houma, Louisiana.

(d) General Welding Supply Company of Tampa, Florida.

(e) Pemco Welding, Inc., of Belle Chasse, Louisiana.

(f) Specific Offshore Equipment Company of Houston, Texas.

(g) Gulf Mississippi Marine Corporation of New Orleans, Louisiana.

(h) Crescent River Pilots Assn. of New Orleans, Louisiana.

(i) Associated Branch Pilots of New Orleans, Louisiana.

(j) Statton & Statton Co., Inc., of Morgan City, Louisiana.

(k) Misener Marine Constructions, Inc., of St. Petersburg, Florida.

(l) Hendry Corporation of Tampa, Florida.

(m) Pass-a-Grille Marina, Inc., of St. Petersburg Beach, Florida.

(n) J. W. Appley & Son, Inc., of St. Petersburg, Florida.

(o) Wilson M. Hubbard Enterprises, of Pass-a-Grille Beach, Florida.

These persons and companies have furnished various services, equipment, and supplies in connection with repair of the damages sustained by Zapata. These witnesses will be called by Zapata to establish its damages.

9. Other witnesses for Zapata with respect to the Tampa proceedings are:

(a) A. Holm-Andersen, marine surveyor and tug valuation expert residing in New Jersey, will be called as a witness for Zapata as to the value of the TUG M/S BREMEN and

(b) Jack Mowbray, tug valuation expert of New York City, will also be called as a witness for Zapata as to the value of the Tug M/S BREMEN.

10. Zapata commenced suit in the Tampa Court on January 12, 1968, with the filing of its complaint and stipulation for court costs. Copy of the complaint in Case No. 68-21 Civ-T is attached to Zapata's Motion for Injunction as Exhibit "A". The following developments have occurred in Case No. 68-21 Civ-T:

(a) On 12th January 1968 a combined Summons against Unterweser and Warrant for Arrest of the tug BREMEN was issued by the Court. A copy thereof is attached as Exhibit 1. On the same day, upon the arrival of the tug BREMEN and the drill rig CHAPARRAL in Tampa Bay, the Summons was served Unterweser's marine superintendent, Captain Otto Litwinski, and the Warrant of Arrest was executed by the attachment of the tug BREMEN. The return of service appears on the back of Exhibit 1.

(b) Also, on 12th January 1968, on behalf of Zapata, Notice of Taking Depositions de bene esse, upon oral examination, of Unterweser's marine superintendent, Captain Otto Litwinski, who was on board the drill rig CHAPARRAL on the voyage from Venice, Louisiana, to Tampa, Florida, and of the Master and crew of the tug BREMEN, designated by rating, was filed under Section 863, 864 and 865 of the Revised

Statutes of the United States. A copy thereof is attached as Exhibit 2. Upon the arrival of the M/S BREMEN in Tampa, said Notice of Taking Depositions was served, and Subpoenaes to attend and give depositions upon oral examinations were served, upon seventeen members of the crew of the tug BREMEN as well as upon the marine superintendent of Unterweser mentioned above.

(c) On 13th January 1968 a second Notice of Taking Depositions upon oral examination under the said revised Statutes was served upon Unterweser and its representatives, designating five additional members of the crew of the tug BREMEN, and seven employees of Zapata Off-Shore Company and one employee of a catering company who were on board the CHAPARRAL on said voyage as prospective witnesses. A copy of this Notice is attached as Exhibit 3.

(d) On 17th January, 1968, on behalf of Zapata a Notice of the Taking of the Deposition, upon oral examination, under the said Revised Statutes, of managing director Erich Von Aswegen of Unterweser was served and Mr. Von Aswegen was served with a subpoena to attend and give evidence by oral deposition. A copy of the Notice is attached as Exhibit 4. The deposition of Mr. Von Aswegen was taken on January 19th, 1968, in Tampa, Florida. Tampa attorneys for Unterweser attended.

(e) The oral depositions of Unterwesr's Marine Superintendent and Port Captain, Captain Otto Litwinski, the Master of the tug BREMEN, Captain Diedrich Kriete, all other officers and members of the crew of the tug BREMEN, and the two unlicensed German sailors who, with Captain Litwinski, constituted the Unterweser runner crew on the CHAPARRAL, were taken between 23rd January and 31st January, 1968, in Tampa, Florida. In all the depositions of 24 Unterweser employees were taken. Tampa attorneys for Unterweser attended.

(f) On 26th January 1968, Zapata consented to the release of the tug BREMEN from attachment upon receipt of a letter of undertaking executed on behalf of the United Kingdom Mutual Steamship Owners' Assurance Association, Limited. Copies of the Consent to Release from Attachment and the Letter of Undertaking are attached as Exhibits 5 and 6, respectively.

(g) On 26th January 1968 a Writ of Restitution issued for restitution of the tug BREMEN to Unterweser. A copy thereof is attached as Exhibit 7.

(h) On or about 29th January, 1968, Unterweser filed a Stipulation for Costs and a claim of ownership of the tug BREMEN. A copy of the Claim is attached as Exhibit 8.

(i) On or about 29th January 1968, Unterweser filed motions to dismiss on the ground of lack of jurisdiction or, alternatively, for entry of an order declining jurisdiction on grounds of forum non conveniens, or staying the further prosecution of Case No. 68-21 Civ-T, and an affidavit of Erich Von Aswegen in support thereof. Copies of the motion and affidavit are attached as Exhibits 9 and 10, respectively.

11. Subsequent to and notwithstanding the filing of the said motions, Unterweser invoked the jurisdiction of this Court in Case No. 68-21 Civ-T and used the Court's judicial processes in its preparations for trial in the Tampa proceedings:

(a) by serving on Zapata on 16th February 1968, Notice of Taking Depositions of the seven employees of Zapata Off-Shore Company and the catering company employee on board the CHAPARRAL previously mentioned. A copy of that Notice is attached as Exhibit 11. The Notice provided that "said depositions will be taken for the purpose of discovery, *for use at trial,* and for such other purposes as are permitted under applicable statutes and rules of civil procedure." These depositions were taken in Tampa,

Florida, by Tampa and New Orleans attorneys for Unterweser under such Notice, beginning on 22nd February and concluding on 25th February 1968. Zapata's Tampa and Houston attorneys also took these witnesses' depositions under the Notice to Take Depositions referred to in paragraph 10(b) above.

(b) by serving on Zapata on 15th March 1968 Notice of Taking Depositions of two surveyors of the Salvage Association, London, Noel Thompson and John Hellendoorn in New Orleans, Louisiana. A copy of that Notice is attached as Exhibit 12. Based on that Notice, Unterweser had issued by the United States District Court at New Orleans, Louisiana, subpoenas duces tecum, which were served upon Noel Thompson and John Hellendoorn. The Notice provided that "the said depositions will be taken for the purpose of discovery in accordance with the Federal Rules of Civil Procedure." The depositions of Noel Thompson and John Hellendoorn were taken by Unterweser in New Orleans, Louisiana, under the Notice, commencing on 9th April and concluding on 12th April 1968. In the course of the depositions both witnesses produced various documents and reports in accordance with the subpoenas issued at Unterweser's request. Zapata also took these witnesses' depositions under an Amended Notice of Taking Depositions under the Federal Rules of Civil Procedure for use as evidence, but not for discovery. Copies of the original and amended notices are attached hereto as Exhibits 13 and 14.

(c) by filing on 27th February 1968 a Motion for Production of Documents, calling for the production of 33 items, consisting of documents, reports, plans, instructions, etc. This motion has been settled by agreement of counsel and Zapata has agreed to provide most of the documents called for. A copy of that motion is attached as Exhibit 15.

12. In addition to the foregoing, the United States District Court in Tampa in Case No. 68-21 Civ-T has heretofore ruled upon motions presented by Zapata and

Unterweser with respect to the order of witnesses to be called for the depositions taken in Tampa, upon a motion presented by Unterweser for the quashing of the subpoenas served upon the members of the crew of the BREMEN, and upon a motion filed by Zapata to exclude an expert consultant, engaged by Unterweser to assist its Tampa and New Orleans attorneys in connection with the proceedings in the Tampa suit, from attending the taking of certain of the depositions. This Court ruled that the expert consultant engaged by Unterweser should be permitted to attend, and the expert consultant did attend the taking of the ten oral depositions noticed by Unterweser's attorneys mentioned above in paragraph 11(a) and (b).

13. By letter dated 11th April 1968, Unterweser's attorneys advised Zapata's attorneys that in connection with the Tampa proceeding (Case No. 68-21 Civ-T) Unterweser's attorneys anticipated taking the depositions of:

(a) an unspecified number of Unterweser witnesses in Germany;

(b) two additional witnesses in New Orleans (Dennis Hayes and Del Breit), along with the possible continuation of the depositions of the Salvage Association, London, surveyors already deposed at New Orleans (Noel Thompson and John Helendoorn);

(c) four Zapata employees in Houston, Texas (Hoyt Taylor, L. V. Whittington, Wiley C. Fenner and James Booth);

(d) representatives of the manufacturer or builder of the drill rig CHAPARRAL in Longview, Texas, or Vicksburg, Mississippi; and

(e) Harry Webber, New York representative of Salvage Association, London. A copy of that letter is attached as Exhibit 16.

14. In Case No. 68-21 Civ-T, oral arguments on Unterweser's motions to dismiss, to decline jurisdiction, or to stay were heard by this Court on April 29, 1968.

Before this Court had rendered its decision on Unterweser's motions to dismiss, to decline jurisdiction, or to stay Case No. 68-21 Civ-T, Unterweser on July 2, 1968, commenced this limitation proceeding, Case No. 68-290 Civ-T, affirmatively seeking:

a. exoneration from liability, or
b. limitation of liability.

Thereafter, Zapata filed its claim on July 8, 1968, and its answer on July 24, 1968, in the limitation proceeding.

This Court, by Memorandum and Order of July 29, 1968, denied Unterweser's motions. A copy of said Memorandum and Order is attached to Zapata's Motion for Injunction as Exhibit "B".

On August 28, 1968, in the limitation proceeding, Unterweser counterclaimed against Zapata, so that now, in addition to exoneration from or limitation of liability Uterweser affimatively seeks in Count I of its counterclaim to recover from Zapata the same damages and sums of money as it seeks to recover from Zapata in its London suit. In Count II of its counterclaim, Unterweser alleges a claim for salvage services rendered the CHAPARRAL. This claim is not asserted in Unterweser's London suit.

15. The subject matter of this litigation has numerous contacts with the United States:

(1) Zapata Off-Shore Company is a Delaware corporation and does business in the United States, including the States of Texas, Louisiana and others.

(2) The CHAPARRAL is a United States vessel, solely owned by Zapata.

(3) The performance of the contract of towage in the United States by defendant consisted, among others, of the following things: Captain Otto Litwinski, Port Captain and Superintendent of defendant's Tug Department, in December, 1967, went to Louisiana to inspect the CHAPARRAL where it was located at a point below Venice, La., in the Mississippi River, to make towing plans for the voyage in question. The

master, the first officer and other members of the crew of the BREMEN boarded the CHAPARRAL prior to the departure on January 5, 1968, for inspections and for making towing arrangements. The BREMEN commenced towing the CHAPARRAL from the point below Venice, Louisiana, above-mentioned, on the afternoon of January 5, 1968. The CHAPARRAL was towed down the Mississippi River to the Gulf of Mexico. The casualty occurred in the Gulf of Mexico in international waters on January 9, 1968. Further performance of the towage contract terminated on the arrival of the CHAPARRAL in tow of the BREMEN at Egmont Key Anchorage, Tampa, Florida, on January 12, 1968. Shortly thereafter, a joint survey was held on board the CHAPARRAL to inspect and determine its damaged condition.

(4) Under the contract of towage, Zapata was obligated to make payment for tug hire to Chase Manhattan Bank, New York City, in favor of defendant.

(5) Under the contract of towage, Zapata was obligated to make payment for the services of the Louisiana pilot that piloted the BREMEN as it towed the CHAPARRAL down the Mississippi River to the Gulf of Mexico. Zapata paid the fee for such pilot services.

(6) Under the contract, Zapata was required to engage a competent and approved surveyor to survey the condition of the CHAPARRAL prior to departure. Zapata engaged the services of Salvage Association, London, at New Orleans, and its surveyors conducted such survey and thereafter on January 5, 1968, issued a certificate for the voyage (limited "to the Florida Straits"). Such services were performed on the CHAPARRAL while on the Mississippi River in Louisiana prior to the BREMEN'S departure on January 5, 1968, towing the CHAPARRAL.

(7) Zapata prepared the CHAPARRAL for tow on the Mississippi River.

(8) As set forth above, there are over 40 witnesses residing in the United States who have knowledge concerning the issues of liability, damages, or the value of the Tug BREMEN, and who may be called by either Zapata or Unterweser.

16. The attorneys for Zapata in the Tampa proceedings, Dewey R. Villareal, Jr., of Tampa, Florida, and James K. Nance of Houston, Texas, have devoted an enormous amount of time to investigating the casualty involved in this suit, interviewing numerous lay witnesses, engaging and consulting with experts, preparing pleadings, motions, four appearances heretofore made in this Court to argue various motions, the taking of 35 oral depositions, researching the law, and preparing and filing memorandum briefs. *Messrs. Villareal and Nance, attorneys for Zapata, have collectively spent over 100 days in connection with the foregoing.* In addition, Zapata has spent over $15,000 (not counting attorneys' fees) for deposition costs, interpreters' fees, witnesses' expenses, photostating of documents, investigation expenses, and travel and lodging costs.

17. In preparation for the trial in the Tampa proceeding, 35 depositions, consisting of some 2170 pages of testimony, have been taken. More than 700 documents have been marked as exhibits in the course of these depositions. Unless Unterweser is enjoined from proceeding with its London suit, copies of the foregoing will have to be forwarded to Zapata's London solicitors and barristers at substantial expense. Moreover, Zapata's American lawyers will have to attempt to communicate, by letter, or conference, or probably both, to their London counterparts the information, gleaned in hundreds of hours of investigation, which is not in the depositions. The expense involved would be very heavy.

18. The attorneys for Zapata in the Tampa proceedings, Dewey R. Villareal, Jr., of Tampa, Florida, and James K. Nance of Houston, Texas, are not licensed to practice law in the English Courts. The solicitors and

Barristers representing Zapata in the London suit are not licensed to practice law in the United States. Messrs. Villareal and Nance are neither experienced in the English practice of taking depositions to be used in English proceedings, nor familiar with the English rules of evidence, and are not qualified to take depositions to be used in Unterweser's suit filed against Zapata in London.

Unless this Court enjoins Unterweser from further proceeding in its London suit pending a final determination of the Tampa proceedings, Zapata, through its London solicitors, will have to make the necessary preparations for the defense of the London suit. Meanwhile, Zapata's American attorneys in the Tampa proceeding will continue to prepare for trial of the case pending in this Court.

Any depositions taken in the future of American or German witnesses whose testimony is relevant to the liability issues in the Tampa and London proceeding would thus require the attendance of the American attorneys representing Zapata in the Tampa proceedings and English solicitors representing Zapata in the London suit. This would result in duplicatious and wasteful, although unavoidable, expenses for legal services and related expenses such as travel costs, hotel costs, etc.

All of the potential witnesses who may testify in the London and Tampa proceedings reside in the United States or in Germany, with the possible exception of a London expert engaged by Unterweser's American attorneys to attend the taking of 10 witnesses' depositions in the Tampa proceedings.

19. Unless Unterweser is enjoined from further proceeding with its London suit pending final determination of the Tampa proceedings, if the London suit goes to trial Zapata hopes to produce in person, at that trial:

A. Zapata employees:
   1. Hoyt Taylor, Vice President and Chief Engineer
   2. L. V. Whittington, Manager of Operations
   3. Wiley C. Fenner, Senior Drilling Superintendent

4. James Booth, Engineer
5. Oscar Willard, Maintenance Superintendent
6. Kenneth Price, Motorman
7. Billy C. Burke, Mechanic-Electrician

B. Others:

8. Noel Thompson, Marine Surveyor
9. John H. W. Hellendoorn, Marine Surveyor
10. A representative of Breit Engineering Company, a naval architecture and engineering firm
11. A representative of R. G. LeTourneau, Inc., regarding the design and construction of the CHAPARRAL
12. A representative of R. G. LeTourneau, Inc., regarding work done in preparation for the voyage in question.
13. Sam Bryan, Metallurgist
14. Joseph Tynan, Marine Surveyor

These 14 witnesses reside in the U. S. Gulf area, with the exception of Hellendoorn who resides in New Jersey. They are material witnesses as to plans and preparations for, or the events of the voyage, or the condition of the CHAPARRAL before or after the voyage.

The current round trip air fare, Houston to London, tourist class, is $572.80. The current round trip fare, Tampa to London, tourist class, is $527.20. In contrast, a round trip air fare, Houston to Tampa, tourist class, is $109.20. The cost per day for a commercial hotel plus meals in London is about $20.

Zapata estimates the cost of air fares and lodging and subsistence incidental to producing the above-mentioned witnesses at a London trial would be $10,000.

20. Zapata is engaged in offshore drilling operations at locations in the Indian Ocean, Gulf of Mexico, Danish North Sea, coastal waters of Africa, and coastal waters of South America. Zapata witnesses mentioned in paragraph 6(b) (1 through 4), Taylor, Whittington, Fenner and Booth, and also Oscar Willard, are key men of managerial status in the Zapata organization, and it would be extremely inconvenient and disruptive of Zapata's offshore drilling operations to send them to London to give evidence.

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE MIDDLE DISTRICT OF FLORIDA TAMPA DIVISION

ZAPATA OFF-SHORE COMPANY, :

Plaintiff, :

vs. : No. 68-21 Civ-T

M/S BREMEN and UNTERWESER REEDEREI GMBH, :

Defendant. : Filed Jan 30 1968

:

SUMMONS AND WARRANT FOR ARREST OF VESSEL AND PROCESS OF MARITIME ATTACHMENT AND GARNISHMENT

THE PRESIDENT OF THE UNITED STATES OF AMERICA, TO THE MARSHAL OF THE MIDDLE DISTRICT OF FLORIDA, GREETING:

WHEREAS on the 30th day of January, 1968, Zapata Off-Shore Company has filed a Complaint against the German Motor Vessel BREMEN, its engines, tackle, etc. and against Unterweser Reederei GMBH for the reasons mentioned in the Complaint for the sum of Two Million Dollars ($2,000,000.00), and praying for process in due form of law against the said Motor Vessel BREMEN and that all persons interested in the said vessel may be cited to answer in the premises, and all proceedings being had, that the said vessel may for the causes in the said Complaint mentioned be condemned and sold to pay the demands of the plaintiff,

NOW, THEREFORE, you are hereby commanded to attach the said Motor Vessel BREMEN, her tackle, appafel, engines, etc. and to detain the same in your custody until the further order of the Court respecting the same, and to give due notice to all persons claiming the same, or claiming any right in or lien upon the same, or knowing or having anything to say why the same should not be condemned and sold pursuant to the prayer of Complaint, that they must file their claims with the Clerk of This Court within ten (10) days after the execution of this

process, or within such additional time as may be allowed by the Court, and must serve their answer within twenty (20) days after the filing of their claims, and

YOU ARE HEREBY FURTHER COMMANDED forthwith to cite and admonish the defendant Unterweser Reederei GMBH to file with the Clerk of this Court, and to serve upon Fowler, White, Collins, Gillen, Humkey and Trenam, attorneys for the plaintiff, whose address is Post Office Box 1438, Tampa, Florida, an Answer to the Complaint within twenty (20) days after service of this Summons, and

YOU ARE HEREBY FURTHER COMMANDED, that if the said defendant Unterweser Reederei GMBH cannot be found within the District, you attach goods and chattels of the said defendant to the amount sued for, wherever found and that you promptly after execution of this process file the same in this Court with your return thereon.

WITNESS, the Honorable Joseph P. Lieb, Judge of said Court at Tampa, Florida this 12th day of January, 1968.

WESLEY R. THIES, Clerk
United States District Court

By: Robert M. Cook
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ZAPATA OFF-SHORE COMPANY,

Plaintiff,

vs. No. 8-21 Civ-T

M/S BREMEN and UNTERWESER REEDEREI GMBH,

Defendant.

NOTICE OF TAKING DEPOSITIONS UPON ORAL EXAMINATIONS

TO: Unterweser Reederei GMBH
and/or its attorneys

M/S Bremen
and/or its attorneys

Master of M/S Bremen
and/or his attorney

PLEASE TAKE NOTICE that the Plaintiff, ZAPATA OFF-SHORE COMPANY, will take the deposition upon oral examination of the below listed parties and/or witnesses, on the dates and at the times shown with respect to each such party and/or witness, before Richard H. Lee, Jr., a Notary Public, or some other officer authorized by law to take depositions, at the offices of Lee & Nicodemus, 922 First Federal Building, 220 Madison Street, Tampa, Florida. The said depositions will be taken under and used in accordance with Sections 863, 864, and 865 of the Revised Statutes of the United States. The oral examinations will continue from day to day until completed. You are invited to attend and cross examine.

EXHIBIT 2

1. MARINE SUPERINTENDENT of Unterweser Reederei GMBH who was on board the Drilling Rig CHAPARRAL, enroute Venice, Louisiana to Tampa, Monday, January 15, 1968, at 2:00 o'clock p.m.

2. MASTER OF M/S BREMEN, Monday, January 15, 1968, at 3:00 o'clock p.m.

3. CHIEF OFFICER, M/S BREMEN, Tuesday, January 16, 1968 at 9:00 o'clock a.m.

4. SECOND OFFICER, M/S BREMEN, Tuesday, January 16, 1968, at 9:30 o'clock a.m.

5. THIRD OFFICER, M/S BREMEN, Tuesday, January 16, 1968, at 10:00 o'clock a.m.

6. CHIEF ENGINEER, M/S BREMEN, Tuesday, January 16, 1968, at 10:30 o'clock a.m.

7. SECOND ENGINEER, M/S BREMEN, Tuesday, January 16, 1968, at 11:00 o'clock a.m.

8. THIRD ENGINEER, M/S BREMEN, Tuesday, January 16, 1968 at 11:30 o'clock a.m.

9. BOATSWAIN, M/S BREMEN, Tuesday, January 16, 1968, at 1:00 o'clock p.m.

10. CARPENTER, M/S BREMEN, Tuesday, January 16, 1968, at 1:30 o'clock p.m.

11. NUMBER ONE ABLE SEAMAN, M/S BREMEN, Tuesday, January 16, 1968, at 2:00 o'clock p.m.

12. NUMBER TWO ABLE SEAMAN, M/S BREMEN, Tuesday, January 16, 1968, at 2:30 o'clock p.m.

13. NUMBER THREE ABLE SEAMAN, M/S BREMEN, Tuesday, January 16, 1968, at 3:00 o'clock p.m.

14. NUMBER ONE ORDINARY SEAMAN, M/S BREMEN, Tuesday, January 16, 1968, at 3:30 o'clock p.m.

15. NUMBER TWO ORDINARY SEAMAN, M/S BREMEN, Tuesday, January 16, 1968, at 4:00 o'clock p.m.

16. NUMBER THREE ORDINARY SEAMAN, M/S BREMEN, Tuesday, January 16, 1968, at 4:30 o'clock p.m.

17. NUMBER ONE MOTOR MAN OR OILER, M/S BREMEN, Tuesday, January 16, 1968, at 5:00 o'clock p.m.

18. NUMBER TWO MOTOR MAN OR OILER, M/S BREMEN, Wednesday, January 17, 1968, at 9:00 o'clock a.m.

19. NUMBER THREE MOTOR MAN OR OILER, M/S BREMEN, Wednesday, January 17, 1968, at 9:30 o'clock a.m.

20. COOK, M/S BREMEN, Wednesday, January 17, 1968, at 10:00 o'clock a.m.

21. GALLEY MAN, M/S BREMEN, Wednesday, January 17, 1968, at 10:30 o'clock a.m.

22. NUMBER ONE SEAMAN RIDING ON DRILL RIG CHAPARRAL WITH MARINE SUPERINTENDENT, Wednesday, January 17, 1968, at 11:00 o'clock a.m.

23. NUMBER TWO SEAMAN RIDING ON DRILL RIG CHAPARRAL WITH MARINE SUPERINTENDENT, Wednesday, January 17, 1968, at 11:30 o'clock a.m.

BAKER, BOTTS, SHEPHERD & COATES
1600 Esperson Building
Houston, Texas 77002

By: James K. Nance
James K. Nance

-and-

FOWLER, WHITE, COLLINS, GILLEN
HUMKEY & TRENAM
P.O. Box 1438, Tampa, Florida

By: Henry R. Villard, Jr.

ATTORNEYS FOR PLAINTIFF

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE MIDDLE DISTRICT OF FLORIDA TAMPA DIVISION

ZAPATA OFF-SHORE COMPANY,

Plaintiff,

vs. No. 63-21 Civ. T.

M/S BREMEN and UNTERWESER REEDEREI GMBH,

Defendant.

NOTICE OF TAKING DEPOSITIONS UPON ORAL EXAMINATIONS

TO: Unterweser Reederei GMBH
and/or its attorneys

M/S BREMEN
and/or its attorneys

Master of M/S BREMEN
and/or his attorney

David C. G. Kerr, Esquire
MACFARLANE, FERGUSON, ALLISON & KELLY
Hillsboro Hotel Building
Tampa, Florida

PLEASE TAKE NOTICE that the Plaintiff, ZAPATA OFF-SHORE COMPANY, will take the deposition upon oral examination of the below listed parties and/or witnesses, on the dates and at the times shown with respect to each such party and/or witness, before Richard H. Lee, Jr., a Notary Public, or some other officer authorized by law to take depositions, at the offices of Lee & Nicodemus, 922 First Federal Building, 220 Madison Street, Tampa, Florida. The said depositions will be taken under and used in accordance with Sections 863, 864, and 865 of the Revised Statutes of the United States. The oral examinations will continue from day to day until completed. You are invited to attend and cross examine.

EXHIBIT 3

1. RADIO OFFICER HARTMUT SIEBERT, Tuesday, January 16, 1968, at 3:30 o'clock p.m.

2. ELECTRICIAN HORST SIECH, Tuesday, January 16, 1968, at 4:00 o'clock p.m.

3. ABLE SEAMAN WOLF SCHONEFELD, Tuesday, January 16, 1968, at 4:30 o'clock p.m.

4. SECOND ENGINEER FRIEDRICH NIEMEIER, Wednesday, January 17, 1968, at 1:00 o'clock p.m.

5. MOTORMAN HANS HOHRING, Wednesday, January 17, 1968, at 1:30 o'clock p.m.

The following employees of ZAPATA OFF-SHORE COMPANY who were riding on the drilling rig:

6. OSCAR D. WILLARD, Wednesday, January 17, 1968, at 2:00 o'clock pm.

7. WILTON JOHNSON, Wednesday, January 17, 1968, at 2:30 p.m.

8. OSCAR W. PAUL, Wednesday, January 17, 1968, at 3:00 o'clock p.m.

9. HOLAN R. GAMBLE, Wednesday, January 17, 1968, at 3:30 o'clock p.m.

10. SAMUEL K. PRICE, Wednesday, January 17, 1968, at 4:00 o'clock p.m.

11. BILLY C. BURKE, Wednesday, January 17, 1968, at 4:30 o'clock p.m.

12. EARL B. RICHIE, Wednesday, January 17, 1968, at 5:00 o'clock p.m.

13. L. J. FRUGE, Wednesday, January 17, 1968, at 5:30 o'clock p.m.

BAKER, BOTTS, SHEPHERD & COATES
1600 Esperson Building
Houston, Texas 77002
By: s/ James K. Nance
James K. Nance

FOWLER, WHITE, COLLINS, GILLEN, HUMKEY & TREMAN
P. O. Box 1438, Tampa, Fla.
By: Dewey R. Villareal, Jr.

ATTORNEYS FOR PLAINTIFF

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ZAPATA OFF-SHORE COMPANY,

Plaintiff,

vs. : No. 68-21 Civ-T

M/S BREMEN and UNTERWESER REEDEREI GMBH,

Defendant.

NOTICE OF TAKING DEPOSITION UPON ORAL EXAMINATION

TO: Unterweser Reederei GMBH
and/or its attorneys

Master of M/S BREMEN
and/or his attorney

David C. G. Kerr, Esquire
Macfarlane, Ferguson, Allison & Kelly
Hillsboro Hotel Building
Tampa, Florida

Savage Shipping Company
203 Marion Street
Tampa, Florida

PLEASE TAKE NOTICE that the Plaintiff, ZAPATA OFF-SHORE COMPANY, will take the deposition upon oral examination of Managing Director Aswegen, on the ____ day of _____, 1968, at _____ o'clock, before Richard E. Lee, Jr., a Notary Public, or some other officer authorized by law to take depositions at the offices of Lee & Nicodemus, 922 First Federal Building, 220 Madison Street, Tampa, Florida. The said deposition will be taken under and used in accordance with Sections 863, 864, and 865 of the Revised Statutes of the United States. The oral examination will continue from day to day until completed. You are invited to attend and cross-examine.

EXHIBIT 4

I HEREBY CERTIFY that a copy of the foregoing Notice of Taking Deposition has been furnished by _____ delivery upon the named addressees this _____ day of _____, 1968.

BAKER, BOTTS, SHEPHERD & COATES
1600 Esperson Building
Houston, Texas 77002

By: _____
James K. Nance

FOWLER, WHITE, COLLINS, GILLEN,
HUNGLY & TREFAM
P. O. Box 1438
Tampa, Florida

By: _____
Dewey R. Villareal, Jr.

ATTORNEYS FOR PLAINTIFF

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE MIDDLE DISTRICT OF FLORIDA TAMPA DIVISION

ZAPATA OFF-SHORE COMPANY,

Plaintiff,

vs. No. 68-21 Civ-T

M/S BREMEN and UNTERWESER REEDEREI GMBH,

Defendants.

CONSENT TO RELEASE FROM ATTACHMENT

ZAPATA OFF-SHORE COMPANY, Plaintiff, hereby consents to the release of the M/S BREMEN, her engines, etc., from attachment under process heretofore issued in this cause.

BAKER, BOTTS, SHEPHERD & COATES
Esperson Building
Houston, Texas

By: /s/ [illegible]

DATE: January 24, 1968

FOWLER, WHITE, COLLINS, GILLEN, HUMKEY & TRENAM
P. O. Box 1438, Tampa, Florida

By:

Attorneys for Plaintiff

EXHIBIT 5

Lamortz, Burns & Co., Inc.

26 BROADWAY
NEW YORK, N. Y. 10004

TELEX
WUI-620332
ITT-421478

TELEPHONE
WHITEHALL 4-7962

CABLE ADDRESS:
LABURNSHIP

CORRESPONDENTS FOR:
THE BRITANNIA STEAM SHIP INSURANCE ASS'N. LTD.
THE LONDON STEAM-SHIP OWNERS' MUTUAL INSURANCE ASS'N. LTD.
THE NEPTUNE PROTECTING AND INDEMNITY ASS'N. LTD.
NEWCASTLE PROTECTION AND INDEMNITY ASS'N.
THE NORTH OF ENGLAND PROTECTING AND INDEMNITY ASS'N. LTD.
THE SHIPOWNERS' MUTUAL STRIKE INSURANCE ASS'N. LTD.
THE STANDARD STEAMSHIP OWNERS' P. & I. ASS'N. LTD.
THE STEAMSHIP MUTUAL UNDERWRITING ASS'N. LTD.
THE SUNDERLAND STEAMSHIP P. & I. ASS'N.
UNITED KINGDOM MUTUAL STEAM SHIP ASSURANCE ASS'N. LTD.

YOUR REF.

OUR REF. ACB/SG

January 24, 1968

Zapata Off-Shore Company
Bank of the Southwest Tower
Houston, Texas

RE: Zapata Off-Shore Company v.
The M/S BREMEN et al
United States District Court
Middle District of Florida
Tampa Division
Civil Action #68-21 CIV. T.

Gentlemen:

In consideration of your releasing from seizure the M/S BREMEN in the above captioned cause now pending in the United States District Court for the Middle District of Florida, Tampa Division, at all times material in this suit owned and operated by Unterweser Reederei G.m.b.H. and not arresting any other vessel of the same ownership, or attaching any property or funds belonging to the said owners of the M/S BREMEN, in connection with the claim of Zapata Off-Shore Company for its damages as alleged in the above described lawsuit, the undersigned, as Underwriter for the M/S BREMEN and her said owners at the time of this casualty, hereby agree with you as follows:

1. To file, or cause to be filed, upon your demand, an appearance on behalf of the said owners of the M/S BREMEN in the suit filed in the United States District Court of the Middle District of Florida, Tampa Division, in connection with the above matter, and to file, or cause to be filed, a claim of owners to the M/S BREMEN in such action, subject to the rights of said owners of the M/S BREMEN to asserting of any right or defenses it may have, including but not limited to challenging jurisdiction of any court and petitioning for limitation of liability.

2. In the event a final decree in such action (after all appeals, if any) be entered in your favor against the M/S BREMEN and/or her owners, the undersigned Underwriter agrees to pay and satisfy said final decree, or any lesser amount decreed by the court through limitation or otherwise, or the amount of any settlement agreed upon between the parties without final decree being rendered, provided always that the liability of the Underwriter hereunder shall not exceed $3,500,000.00, including interest and costs.

3. Upon demand, to cause to be filed in such action a bond in the form and sufficiency of surety satisfactory to you or to the court, in an amount not to exceed $3,500,000.00, the exact amount to be fixed by agreement of the parties, or in the absence of agreement by the parties, by the court. In the event any such bond is required, and is filed the undersigned shall have no further obligation under this letter.

4. If you commence any action in any court of the competent jurisdiction in the United States in connection with this letter of undertaking, the undersigned agrees to file, or cause to be filed upon your demand, an appearance and answer in said action.

If you commence any action in connection with this letter of undertaking the undersigned irrevocably appoints the Secretary of State of the State in which the action is commenced, or his successor, as agent for the undersigned upon whom process may be served and be binding upon the undersigned.

This letter is written entirely without prejudice to the rights or defenses which the said M/S BREMEN or its said owners may have, including but not limited to, challenging jurisdiction of any court and petitioning for limitation of liability.

It is understood and agreed that the signing of this letter on our behalf by Lamorte, Burns & Co., Inc. as our Attorney-in-Fact does not bind Lamorte, Burns & Co., Inc. personally, but does bind the United Kingdom Mutual Steam Ship Assurance Association Limited.

Lamorte, Burns & Co., Inc. expressly represents that it has been authorized by the United Kingdom Mutual SteamShip Assurance Association Limited to sign this letter on behalf of the undersigned as its Attorney-in-Fact for this limited purpose only.

Very truly yours,

UNITED KINGDOM MUTUAL STEAM SHIP ASSURANCE ASSOCIATION LIMITED

LAMORTE, BURNS & CO., INC.

By:

August C. Burns
President

(As Attorney-in-Fact for the above limited purpose only, as per cable authority received from the United Kingdom Mutual Steam Ship Assurance Association Limited under date of January 24, 1968.)

United States District Court

MIDDLE
~~SOUTHERN~~ DISTRICT OF FLORIDA
TAMPA DIVISION

Copy of

WRIT OF RESTITUTION IN CAUSE PENDING IN ADMIRALTY

68-21-Civ.T.

FILED
TAMPA, FLA.
FEB 1 - 1968
WESLEY R. THIES
CLERK

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To the Marshal of the ~~Southern~~ Middle District of Florida—GREETING:

WHEREAS, in a certain cause moved and prosecuted in the District Court of the United States for the ~~Southern~~ Middle District of Florida, on behalf of ZAPATA OFF-SHORE COMPANY, Plaintiff

against M/S BREMEN and UNTERWESER REEDEREI GMBH, Defendants

a consent to release from attachment has been filed by Plaintiff ~~exclusive of any interest of the~~

and a stipulation filed by

for the restitution of said M/S BREMEN

now in your custody under a writ of attachment heretofore issued in said cause.

YOU ARE THEREFORE, by these presents authorized to and empowered to relinquish the said M/S BREMEN

from said attachment, and to deliver the possession thereof to the said claimant,

upon receiving in your hand the sum of your expenses incurred in the care and custody of the same.

HEREOF fail not; and how you execute this writ make known to your return hereof indorsed.

WITNESS, the Honorable Ben Krentzman ~~LARR JONES~~, Judge of said Court, at Tampa, in said District, this 26th day of January A. D. 1968.

WESLEY R. THIES
Clerk.

By
Deputy Clerk.

EXHIBIT 7

IN THE UNITED STATES DISTRICT COURT, IN AND FOR THE MIDDLE DISTRICT OF FLORIDA, TAMPA DIVISION.

ZAPATA OFF-SHORE COMPANY,

Plaintiff,

-vs-

M/S BREMEN and UNTERWESER REEDEREI GMBH,

Defendants.

NO. 68-21 CIV. T.

CLAIM OF OWNER

NOW COMES, UNTERWESER REEDEREI GMBH, a foreign corporation, and says that it is the true and bona fide owner of the M/S BREMEN, her engines, tackle, apparel, equipment, etc., as the same are proceeded against in the above entitled cause, and that no other person or corporation is the owner thereof.

WHEREFORE, Claimant prays that it may be permitted to defend accordingly, reserving, however, the right to challenge the jurisdiction of this Court by appropriate Motion or Motions.

UNTERWESER REEDEREI GMBH

By: _____
ERICH VON ASKEGEN
Managing Director

MACFARLANE, FERGUSON, ALLISON and KELLY

By: _____
DAVID C. G. KERR
Post Office Box 1531
Tampa, Florida 33601

Attorneys for Claimant - Defendant

EXHIBIT 8

IN THE UNITED STATES DISTRICT COURT, IN AND FOR THE MIDDLE DISTRICT OF FLORIDA,
TAMPA DIVISION.

ZAPATA OFF-SHORE COMPANY,

Plaintiff,

-vs-

M/S BREMEN and UNTERWESER REEDEREI GMBH,

Defendants.

NO. 68-21 CIV. T.

MOTION TO DISMISS ON THE GROUND OF LACK OF JURISDICTION OR, ALTERNATIVELY, FOR ENTRY OF AN ORDER DECLINING JURISDICTION AND/OR STAYING THE FURTHER PROSECUTION OF THESE PROCEEDINGS.

COMES NOW the Claimant-Defendant, UNTERWESER REEDEREI GMBH, a corporation, by its attorneys undersigned, and shows unto the Court as follows:

1. That, as averred in Paragraph III of Plaintiff's Complaint, Plaintiff entered into a written towage contract with Claimant-Defendant under date of November 3, 1967, whereby Defendant agreed to tow the Drilling Barge CHAPARRAL from Venice, Louisiana to a point near Ravenna, Italy; further, that the casualty out of which the within litigation arose occurred during the course of performance of said towage contract.

2. That, as set forth in the affidavit of ERICH VON ASWEGEN, one of the Managing Directors of UNTERWESER REEDEREI GMBH, Defendant herein and Claimant and owner of the M/S BREMEN, which said affidavit is annexed hereto as Claimant-Defendant's Exhibit "A", the parties to said towage contract stipulated and agreed that "Any dispute arising must be treated before the London Court of Justice"; that, accordingly, this Court has no jurisdiction over the subject matter of this claim.

3. That in the alternative, in light of the matters set forth in the affidavit of ERICH VON ASWEGEN, annexed hereto as Exhibit "A", the Court should decline to assume jurisdiction over

the within cause on the ground of forum non conveniens.

4. That, in the alternative, this Court should enter an Order staying the further prosecution of these proceedings pending the submission of the dispute sought to be raised by Plaintiff to the London Court of Justice, all in accordance with the towage contract, copy of which is attached to and identified by Exhibit "A" to this Motion.

WHEREFORE, Claimant-Defendant moves this Honorable Court to enter an Order:

(a) Dismissing Plaintiff's Complaint on the ground of lack of jurisdiction; or

(b) Declining jurisdiction over the cause of action asserted in Plaintiff's Complaint on the ground of forum non conveniens; and/or

(c) Staying the further prosecution of these proceedings pending the submission of the dispute set out in Plaintiff's Complaint to the London Court of Justice.

MACFARLANE, FERGUSON, ALLISON and KELLY

By: _____
DAVID C. O. KERR
Post Office Box 1531
Tampa, Florida 33601

Attorneys for Claimant - Defendant

IN THE UNITED STATES DISTRICT COURT, IN AND FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ZAPATA OFF-SHORE COMPANY,)
Plaintiff,)
vs.)
M/S BREMEN and UNTERWESER REEDEREI GMBH,) No. 68-21 Civ. T.
Defendants.)

AFFIDAVIT

STATE OF FLORIDA)
COUNTY OF HILLSBOROUGH) ss.

BEFORE ME, the undersigned authority, personally appeared ERICH VON ASWEGEN, who, being by me first duly sworn, deposes and says:

1. That he is one of the Managing Directors of UNTERWESER REEDEREI GMBH, a corporation organized and existing under the Laws of West Germany, which said corporation is the Claimant-Defendant in the above entitled and numbered cause.

2. That Affiant, in his capacity as one of the Managing Directors of UNTERWESER REEDEREI GMBH, has personal knowledge respecting that certain towage contract entered into by and between ZAPATA OFF-SHORE COMPANY and UNTERWESER REEDEREI GMBH, at Bremen, Germany, under date of November 3, 1967, and respecting the negotiations leading up to the execution of that contract.

3. That there is annexed hereto as Affiant's Exhibit No. 1 a photostatic copy of the towage contract aforementioned, which said contract Affiant has examined and knows of his own personal knowledge to be a true and correct copy of that certain towage contract dated Bremen, November 3, 1967, by and between ZAPATA OFF-SHORE COMPANY and UNTERWESER REEDEREI GMBH.

4. That the provision contained in said contract, identified as Paragraph No. 8 under "General Towage Conditions," which reads as follows:

> "8. Any dispute arising must be treated before the London Court of Justice,"

was considered by UNTERWESER REEDEREI GMBH to be of overriding importance. As set forth in the towage contract (clause 15 thereof), the General Towage Conditions, including specifically clause 8 thereof hereinbefore quoted, were to be considered an "integral part" of the towage contract. Ordinarily, UNTERWESER REEDEREI GMBH towage contracts provide for exclusive German jurisdiction and for the application of German law. In this instance, in an effort to meet ZAPATA OFF-SHORE COMPANY half way, UNTERWESER REEDEREI GMBH proposed the London Court of Justice. Had this provision not been accepted by ZAPATA OFF-SHORE COMPANY, UNTERWESER REEDEREI GMBH would not have entered into the towage contract, said provision being considered fundamental to the agreement.

5. That on the basis of his personal knowledge, Affiant states:

(a) That the casualty involving the M/S BREMEN and the barge CHAPARRAL out of which the within proceedings have arisen occurred in International Waters.

(b) That the M/S BREMEN was constructed in West Germany in the year 1967; that she is licensed and documented under the Laws of West Germany, having her home port at Bremen, Germany; and that the officers and crew of the M/S BREMEN are, without exception, of German nationality.

(c) That UNTERWESER REEDEREI GMBH is the owner of the M/S BREMEN; that said corporation is a corporation organized and existing under the Laws of West Germany, and that a controlling interest therein is owned by another German corporation.

(d) That final acceptance of the contract entered into by and between ZAPATA OFF-SHORE COMPANY and UNTERWESER REEDEREI GMBH, dated Bremen, November 3, 1967, occurred at Bremen, Germany and that the performance thereof, in large part, was to have taken place in International Waters; that final performance thereof was to have occurred in the vicinity of Ravenna, Italy, and that final payment thereunder was not to have been made until delivery of the tow at or near Ravenna, Italy.

(e) That the arrest of the M/S BREMEN at Tampa, Florida, was possible only by reason of the happenstance

of Tampa being the closest port of refuge subsequent to the occurrence of the casualty in International Waters; that Tampa, Florida, and the United States District Court for the Middle District of Florida constitutes an inaccessible and inconvenient forum insofar as UNTERWESER REEDEREI GMBH is concerned; that the location of the foreign forum selected by the parties under and pursuant to the aforementioned towage contract, copy of which is attached hereto as Affiant's Exhibit No. 1, namely, London, England, constitutes the "balance of convenience" insofar as the relative positions of the parties hereto are concerned.

(f) That in agreeing upon the designation of the London Court of Justice as the forum to which any dispute arising under the aforesaid towage contract would be submitted, the parties intended that the controlling law to be applied would be the law of the forum, i.e., English law.

6. That Affiant has agreed through his counsel of record, and hereby reiterates his agreement, to make himself available in the United States and, at the request of counsel for the Plaintiff, at Tampa, Florida, to give his Deposition on the jurisdictional issues raised by the Motions to which this Affidavit is annexed.

Erich von Aswegen

ERICH VON ASWEGEN

SWORN TO AND SUBSCRIBED before me this 29th day of January, 1968.

Notary Public, State of Florida at Large

My Commission expires:

Notary Public State of Florida at Large
My Commission Expires Dec. 9, 1970

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE MIDDLE DISTRICT OF FLORIDA TAMPA DIVISION

ZAPATA OFF-SHORE COMPANY,

Plaintiff,

vs. NO. 68-21 Civ-T

M/S BREMEN and UNTERWESER REEDEREI GMBH,

Defendants.

NOTICE OF TAKING DEPOSITIONS

TO: James K. Nance, Esquire
Baker, Botts, Shepherd & Coates
1600 Esperson Building
Houston, Texas 77002

Dewey R. Villareal, Jr., Esquire
Fowler, White, Collins, Gillen, Humkey & Trenam
P. O. Box 1438
Tampa, Florida
Attorneys for Plaintiff

PLEASE TAKE NOTICE that commencing on the 22nd day of February, 1968, the Defendant, UNTERWESER REEDEREI GMBH, will take the depositions upon oral examination of the below listed persons, on the dates and at the times listed with respect to each such witness, before RICHARD H. LEE, JR., a notary public or some other person duly authorized by law to take depositions in the aforesaid place, at the offices of Lee and Nicodemus, 922 First Federal Building, 220 Madison Street, Tampa, Florida. The said depositions will be taken for the purpose of discovery, for use at trial, and for such other purposes as are permitted under applicable statutes and rules of civil procedure. The depositions will continue from day to day until completed.

PLEASE GOVERN YOURSELVES ACCORDINGLY.

1. OSCAR D. WILLARD, February 22, 1968, at 9:30 a.m.
2. WILTON JOHNSON, February 23, 1968, at 9:30 a.m.

EXHIBIT 11

3. OSCAR W. PAUL, February 23, 1968, at 1:30 p.m.
4. NOLAN R. GAMBLE, February 23, 1968, at 2:30 p.m.
5. SAMUEL K. PRICE, February 23, 1968, at 3:30 p.m.
6. BILLY C. BURKE, February 23, 1968, at 4:30 p.m.
7. EARL B. RICHIE, February 23, 1968, at 5:30 p.m.
8. L. J. FRUGE, February 23, 1968, at 6:30 p.m.

/s/ Jack C. Rinard

JACK C. RINARD OF
MACFARLANE, FERGUSON, ALLISON & KELLY
P. O. Box 1531, Tampa, Florida 33601
ATTORNEYS FOR DEFENDANT

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE MIDDLE DISTRICT OF FLORIDA TAMPA DIVISION

ZAPATA OFF-SHORE COMPANY,

Plaintiff,

vs. No. 68-21 Civ-T

M/S BREMEN and UNTERWESER REEDEREI GMBH,

Defendants.

NOTICE OF TAKING DEPOSITIONS

TO: James K. Hance, Esquire
Baker, Botts, Shepherd & Coates
1600 Esperson Building
Houston, Texas 77002

Dewey R. Villareal, Jr., Esquire
Fowler, White, Collins, Gillen, Humkey & Trenam
P. O. Box 1438
Tampa, Florida
Attorneys for Plaintiff

PLEASE TAKE NOTICE that commencing on the 9th day of April, 1968, the Defendant, UNTERWESER REEDEREI GMBH, will take the depositions upon oral examination of the below listed persons, on the dates and at the times listed with respect to each such witness, before Earl Christenberry, a Notary Public, or some other officer authorized by law to take depositions, at the offices of Jones, Walker, Waechter, Pointevent, Carrere & Benegre, 28th Floor, 225 Baronne Street, New Orleans, Louisiana. The said depositions will be taken for the purpose of discovery, in accordance with the Federal Rules of Civil Procedure. The depositions will continue from day to day until completed.

PLEASE GOVERN YOURSELVES ACCORDINGLY.

1. Noel Thompson — on April 9, 1968
225 Baronne Street — at 9:00 A.M.
New Orleans, Louisiana

2. John Hollendoorn — on April 9, 1968
Salvage Association — at 11:00 A.M.
London
New York City Office

JAMES C. HIGGINS
MACFARLANE, FERGUSON, ALLISON & KELLY
P. O. Box 1531, Tampa, Florida 33601
and
PARIS, ELLIS, CUTRONE, GILMORE & LAUTENSCHLAGER
Whitney Building, New Orleans, Louisiana
ATTORNEYS FOR DEFENDANT

EXHIBIT 12

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE MIDDLE DISTRICT OF FLORIDA TAMPA DIVISION

ZAPATA OFF-SHORE COMPANY, :

Plaintiff, :

vs. : No. 68-21 Civ-T

M/S BREMEN and UNTERWESER REEDEREI GMBH, :

Defendants. :

filed 2-20-68

NOTICE OF TAKING DEPOSITIONS UPON ORAL EXAMINATION

TO: Macfarlane, Ferguson, Allison & Kelly
P. O. Box 1531 - Hillsboro Hotel Bldg.
Tampa, Florida

- and -

Faris, Ellis, Cutrone, Gilmore & Lautenschlaeger
Whitney Building
New Orleans, Louisiana 70130
Attorneys for Claimant-Defendant Unterweser Reederei GMBH

PLEASE TAKE NOTICE that the plaintiff Zapata Off-Shore Company, will take the depositions upon oral examination of the below listed witnesses on the dates and at the times shown with respect to each such witness, before Earl Christenberry, a Notary Public, or some other officer authorized by law to take depositions, at the offices of Jones, Walker, Waechter, Pointevent, Carrere & Denegre, 28th Floor, 225 Baronne Street, New Orleans, Louisiana. The said depositions will be taken for the purpose of use as evidence in the action, not for discovery, in accordance with the Federal Rules of Civil Procedure. The oral examinations will continue from day to day until completed. You are invited to attend and cross-examine.

1. Noel Thompson — on Wednesday, March 13, 1968
225 Baronne Street — at 9:00 a.m.
New Orleans, La.

2. John Hollendoorn — on Wednesday, March 13, 1968
Salvage Association, London — at 11:00 a.m.
NewyYork City office

EXHIBIT 13

3. James Booth
1700 Houston Club Bldg.
Houstoh, Texas
on Wednesday, March 13, 1968 at 1:00 p.m.

4. Hoyt Taylor
1700 Houston Club Bldg.
Houston, Texas
on Wednesday, March 13, 1968 at 3:00 p.m.

BAKER, BOTTS, SHEPHERD & COATES
1600 Esperson Building
Houston, Texas 77002

By: s/ Darnell K. Mauzy

and

FOWLER, WHITE, COLLINS, GILLEN, HUMKEY and TRENAM
P. O. Box 1438, Tampa, Florida

By: s/ Dewey R. Villareal Jr.

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE MIDDLE DISTRICT OF FLORIDA TAMPA DIVISION

ZAPATA OFF-SHORE COMPANY,

Plaintiff,

vs.

M/S BREMEN and UNTERWESER REEDEREI GMBH,

Defendants.

No. 68-21 Civ-T

filed 3/15/68

AMENDED NOTICE OF TAKING DEPOSITIONS UPON ORAL EXAMINATION

TO: Macfarlane, Ferguson, Allison & Kelly
P. O. Box 1531
Tampa, Florida
- and -
Faris, Ellis; Cutrone, Gilmore & Lautenschaeger
Whitney Building
New Orleans, Louisiana 70130
Attorneys for Claimant-Defendant Unterweser Reederei GMBH

PLEASE TAKE NOTICE that the plaintiff Zapata Off-Shore Company, will take the depositions upon oral examination of the below listed witnesses on the dates and at the times shown with respect to each such witness, before Earl Christenberry, a Notary Public, or some other officer authorized by law to take depositions, at the offices of Jones, Walker, Waechter, Poitevent, Carrere & Denegre, 28th Floor, 225 Baronne Street, New Orleans, Louisiana. The said depositions will be taken for the purpose of use as evidence in the action, not for discovery, in accordance with the Federal Rules of Civil Procedure. The oral examinations will continue from day to day until completed. You are invited to attend and cross-examine.

1. Noel Thompson — Tuesday, April 9, 1968
   225 Baronne Street — 9:00 a.m.
   New Orleans, La.

2. John Hellendoorn — Tuesday, April 9, 1968
   Salvage Assoc., London — 11:00 a.m.
   New York City office

EXHIBIT 14

3. Kenneth Price
739 Cunningham
Gainesville, Texas

Tuesday, April 9, 1968
1:00 p.m.

BAKER, BOTTS, SHEPHERD & COATES
1600 Esperson Building
Houston, Texas 77002
- and -
FOWLER, WHITE, COLLINS, GILLEN,
HUMKEY & TRENAM
P. O. Box 1438, Tampa, Florida
Attorneys for Plaintiff

By: s/ Lacy P. Williams Jr.

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE MIDDLE DISTRICT OF FLORIDA TAMPA DIVISION

ZAPATA OFF-SHORE COMPANY,

Plaintiff,

vs.

No. 68-21 Civ-T

M/S BREMEN and UNTERWESER REEDEREI GMBH,

Defendants.

FILED
TAMPA, FLA.
FEB 27 1968
WESLEY R. THIES
CLERK

MOTION FOR PRODUCTION OF DOCUMENTS

Defendant, UNTERWESER REEDEREI GMBH, pursuant to Rule 34 Federal Rules of Civil Procedure, moves the Court for an order requiring Plainitff, ZAPATA OFF-SHORE COMPANY, to produce and to permit Defendant to inspect and copy each of the following documents and objects:

1. The negatives and/or copies of Exhibits 16-1 through 16-5 which were marked for identification by Plaintiff during the deposition of Otto Litwinski and which are photographs of portions of the drill barge CHAPARRAL.

2. Translated copies of all log books produced by Defendants during the depositions of: Otto Litwinski; Captain Kriete; the crew of the M/S BREMEN.

3. All weather reports obtained by Plaintiff relating to the proposed tow voyage of the drill barge CHAPARRAL from Venice, Louisiana, to Ravenna, Italy, including but not limited to all weather reports obtained during the period of January 1, through January 12, 1968.

4. All weather reports transmitted by Plaintiff relative to the proposed tow voyage of the drill barge CHAPARRAL from Venice, Louisiana, to Ravenna, Italy, including but not limited to weather reports transmitted during the period of January 1, through January 12, 1968.

EXHIBIT 15

5. All radio logs maintained by the Plaintiff at any place from January 1, through January 12, 1968.

6. Strain gauge recording charts from the bow, port and starboard legs of the drill barge CHAPARRAL reflecting tracings made during the period of January 5, 1968, through January 9, 1968.

7. All written instructions, memoranda, and correspondence promulgated by Plaintiff to its officers, agents, and employees relative to the use of strain gauge recorders.

8. All maintenance and operational manuals and written instructions issued by the manufacturer of the strain gauge recorder aboard CHAPARRAL.

9. All written instructions, memoranda, or correspondence from the manufacturer of the strain gauge recorders aboard CHAPARRAL and from the builder of the CHAPARRAL, relative to the installation, operation and use of the strain gauge recorders aboard CHAPARRAL.

10. All official Ship's Documents of the CHAPARRAL including but not limited to certificate of enrollment, certificate of registration, crew list, and cargo manifest.

11. All written instructions, memoranda, or correspondence relative to the maintenance of CHAPARRAL, her machinery, and equipment promulgated by the builder of CHAPARRAL, including but not limited to the "Maintenance Manual" for CHAPARRAL.

12. All written instructions, memoranda, or correspondence promulgated by Plaintiff relative to the maintenance of CHAPARRAL and her machinery and equipment.

13. All instructions, memoranda, and correspondence promulgated by Plaintiff relative to operating procedures

on CHAPARRAL, including but not limited to the "Operational Instructions for The LeTourneau Wide Base Platform".

14. All drawings, plans, or specifications relating to (1) modifications of CHAPARRAL and (2) preparation of CHAPARRAL for the tow voyage, including but not limited to the following items:

a. Reinforcement of legs.

b. Installation of crane and elevator on port leg.

c. Installation of additional bow tanks.

d. Installation of additional stern tanks.

e. Installation of "Locking Devices".

15. All instructions, memoranda, and correspondence, (1) promulgated by Plaintiff or (2) promulgated by the manufacturer, in the possession, custody or control of Plaintiff, relating to the manufacture, installation and operation of the "Locking Devices".

16. Copy of the contract between Plaintiff and the Italian corporation, company, partnership or other business entity relating to the employment of CHAPARRAL in or around Italy, including all correspondence, memoranda, price quotations, bids, telegrams and/or cables relating to said contract.

17. All correspondence, memoranda, written instructions, certificates, documents, telegrams and/or cables relating to (1) the proposed towage contract and (2) the proposed tow voyage with UNTERWESER REEDEREI.

18. All written instructions, correspondence, and memoranda, between Plaintiff and (1) London Salvage Association and (2) agents of London Salvage Association related to the tow voyage of CHAPARRAL.

19. All written instructions, reports, correspondence and memoranda between Plaintiff and United States Coast Guard, including but not limited to inspections of CHAPARRAL by the United States Coast Guard relating to CHAPARRAL.

20. All written instructions, correspondence, and memoranda with the Ship's Agent of CHAPARRAL relating to the tow voyage.

21. All correspondence, reports, written instructions and memoranda from or to United States Customs relating to the voyage of CHAPARRAL.

22. All written instructions, correspondence, and memoranda from Management to any of the following, relating to (1) the proposed tow voyage and (2) preparation for tow of CHAPARRAL;

a. Jim Booth
b. Buster Wittington
c. Hoyt Taylor
d. Walley Fenner
e. Oscar Willard
f. Wilton Johnson
g. Otto Litwinski
h. Captain Kriete

23. Copies of any technical reports or calculations, of any nature, made for or received by Plaintiff in contemplation of the tow voyage of CHAPARRAL, including but not limited to those relating to stability, hull stresses, hogging and sagging stresses, leg stresses, limitation of leg stresses, weights added prior to departure and weights at departure.

24. Copies of employment contracts between Plaintiff and Plaintiff's riding crew aboard CHAPARRAL.

25. All documents, certificates, correspondence, instructions and memoranda between Plaintiff and surveyors employed by Plaintiff in connection with the tow voyage of CHAPARRAL, including but not limited to Hayes, Thompson and Hellendoorn.

26. All documents, correspondence, written instructions and memoranda between Plaintiff and Marine Engineers, ship yards, and naval architects employed by Plaintiff in connection with the tow voyage of CHAPARRAL.

27. All documents, written instructions, correspondence, memoranda and telegrams between Plaintiff and R. G. Le Tourneau relating to any work to be performed in connection with the tow voyage of CHAPARRAL.

28. Copies of the original and amended Displacement Scales for CHAPARRAL.

29. The sound recording tapes made by Samuel K. Price, Motorman, of noises aboard CHAPARRAL while under tow.

30. The sound recording tape log kept by Samuel K. Price, Motorman, in connection with the recording of noises aboard CHAPARRAL while under tow.

31. The log book maintained by Samuel K. Price, Motorman, relating to trim and ballast conditions of CHAPARRAL.

32. 480 feet of 16 millimeter color film taken by Samuel K. Price, Motorman, of CHAPARRAL while under tow.

33. All written instructions, correspondence, and memoranda relating to the taking of sound recordings and movies aboard CHAPARRAL while under tow.

Plaintiff has the possession, custody, or control of each of the foregoing documents and objects, each of which constitute or contain evidence relevant and material to a matter involved in this action, as is more fully shown in Exhibit "A" hereto attached.

DAVID C. O. KERR
Of
MACFARLANE, FERGUSON, ALLISON & KELLY
P. O. Box 1531, Tampa, Florida 33601
-and-
PARIS, ELLIS, CUTRONE, GILMORE & LAUTENSCHLAEGER
Whitney Building, New Orleans, Louisiana
ATTORNEYS FOR DEFENDANT

FARIS, ELLIS, CUTRONE, GILMORE & LAUTENSCHLAEGER
COUNSELLORS AT LAW
WHITNEY BUILDING
NEW ORLEANS 70130

WARREN M. FARIS
T. C. W. ELLIS
CAMILLE A. CUTRONE
J. Y. GILMORE, JR.
L. J. LAUTENSCHLAEGER, JR.
PATRICK L. BURKE
CLARENCE A. FROST
JOY SIMMONS MILLER
MAT M. GRAY, III

CABLE ADDRESS
"WARFAR"
NEW ORLEANS
4957

April 11, 1968

Re: Zapata Off-Shore Company
vs. M/S BREMEN
Your File No. W-5153

Mr. James K. Mance
Baker, Botts, Shepherd & Coates
Esperson Building
Houston, Texas 77002

Dear Jim:

In view of the fact that we have four sets of lawyers to accommodate, as well as the schedule of witnesses, we thought it advisable to review our respective calendars at this time for the purpose of setting depositions in the future.

Insofar as we are now able to anticipate, the following additional witnesses will undoubtedly be deposed in this case, and the list is certainly not intended to be exclusive:

a - deposition of Unterweser witnesses in Germany. This matter was discussed before Judge Krentzman at the time of argument on the Motion for Protective Order.

b - depositions of Dennis Hayes and Del Breit in New Orleans; also the possible continuation of depositions of Noel Thompson and John Hollendoorn in the event that the so-called "confidential" telex messages are produced at a later date.

EXHIBIT 16

c - depositions in Houston of Messrs. Taylor, Fenner, Wittington and Booth and possibly other management and executive personnel at Zapata.

d - depositions of Le Tourneau representatives having connection or knowledge of this matter.

e - deposition of Mr. Harry Webber, Salvage Association, New York.

As indicated, the foregoing list is not intended to preclude either you or ourselves from taking additional depositions; however, the ones listed appear to us to be fairly obvious at this time. Accordingly, we think it would be wise to plan our calendars so that we can avoid inconvenience to the witnesses and conflicts among the attorneys involved.

Cordially,

Warren M. Faris
For the Firm

WMF:cw

cc: Mr. David C. G. Kerr
Mr. D. R. Villareal, Jr.
Mr. Michael D. Miller
Mr. Norman G. DeWeir

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ZAPATA OFF-SHORE COMPANY,

Plaintiff,

V. NO. 68-21-Civ-T

M/S BREMEN AND UNTERWESER REEDEREI, GMBH,

Defendants.

AFFIDAVIT

BEFORE ME, the undersigned authority, personally appeared Fergus Dingwall Bateson, who, being by me first duly sworn, deposes and says:

1. My name is Fergus Dingwall Bateson. I am a partner in the law firm of Thomas Cooper & Co., Solicitors of Baltic House, 27 Leadenhall Street, London, England. I hold a Degree in Litterae Humaniores at the University of Oxford.

2. My legal education consisted of two courses of study at the School of Law of the Law Society, culminating in my passing the final examinations of the Law Society with Honours. The Law Society is the only body authorised to set qualifying examinations for Solicitors in England. I was admitted to practise as a Soliciter in the courts of England on 2nd July 1956, and am duly licensed to practise as such at this time. I am a specialist in the practice of English Maritime and Admiralty Law, and have practiced in this field of law for about twelve years past.

3. I have been requested by Mr. James K. Nance, partner in the law firm of Baker, Botts, Shepherd and Coates, Houston, Texas, to submit an opinion, under the

English Law, concerning the validity of certain provisions of towage contract entered into between Unterweser Reederei GMBH, Bremen, Germany, and Zapata Off-Shore Company, Houston, Texas, relating to the towing of the Drill Barge CHAPARRAL from Venice, Louisiana, to a point near Ravenna, Italy. A copy of the said contract is annexed to this affidavit and marked for identification "P.D.B.1." The provisions in question are described as "General Towage Conditions", clauses 1, 2, 3 and 4, and read as follows:

1.(omissis) "Urag, their masters and crews are not responsible for defaults and/or errors in the navigation of the tow".

(According to said contract of towage, "Urag" refers to "Unterweser Reederei GMBH).

2.(a) For damages suffered by the tug the Owners of the towed object are responsible unless they prove that those damages are caused by default of the tug.

For loss or damages which the tug suffers through her own fault by collision with third parties the tug shall only be responsible in so far as such loss or damages are not occasioned or contributed to by the towed object.

(b) Damages suffered by the towed object are in any case for account of its Owners.

(c) Damages caused to third parties by the tug and/or the towed object are to be made good by the Owners of the towed object. This does not apply if they prove that damages are caused entirely by default of the tug.

3. The Owners of the tug cannot be held liable if for unforeseen reasons the voyage cannot be started at all, if the commencement of the voyage is delayed or if any stay and/or delay occur during the voyage. The Owners of the tug are particularly not liable for breaking or slipping of tow ropes and/or towing gear, premature shortage of bunkers on account of bad weather, delay, damages or loss due to the Act of God, Force Majeure, perils of the Sea, strikes, lock-outs, labour troubles, enemies, hostilities, war, epidemic, quarantine, embargo, restraint of any government, rulers or people, salvage operations or any other kind of assistance.

4. As far as the liability of the tug is excluded or has been taken over by the Owners of the towed object, the latter are also under obligation of keeping the tug Owners indemnified for all claims of third parties or to indemnify them for any claim already realised by them. This also applies if the Owners of the towed object call on third parties and the latter try to recover against the tug Owners. The Owners of the object have the same obligation towards employees and agents of the tug Owners. Furthermore they are obligated not to sue the employees and agents themselves.

4. According to information furnished me by Mr. James K. Nance, one of Zapata Off-Shore Company's attorneys, the Drill Barge CHAPARRAL sustained a casualty on January 9, 1968, while under tow of the Tug M/S BREMEN, owned by Unterweser Reederei GMBH.

5. It is my opinion that the above quoted exculpatory clauses, under English law, are not against the public policy of England, and would be held to be prima facie valid and enforceable by an English Court should a cause of action be filed in England either by way of original Action or by way of counterclaim by Zapata Off-Shore Company against Unterweser Reederei GMBH to recover damages sustained by the CHAPARRAL, and in which said cause of action Zapata Off-Shore Company alleged that "defaults and/or errors in the navigation of the tow" on the part of Unterweser Reederei and the master and crew of the Tug M/S BREMEN caused the casualty and resulting damage to Zapata.

6. The question whether exculpatory clauses in a towage contract could be contrary to public policy was considered by Mr. Justice Hill in The "PRESIDENT VAN BUREN" (1925) 132 Law Times Reports p.253, a copy of whose Judgment is annexed to this affidavit and marked for identification "F.D.B.2".

It will be seen that the exculpatory clause under consideration in that case was more stringent than the nexus of exculpatory provisions in the present contract in that the Tugowners were not only exonerated from liability for damage caused to the vessel towed, but were also entitled to be indemnified in respect of claims by third parties, and to an indemnity in respect of damage caused to the tug, in each case even though the damage was occasioned by negligence of the Tugowners' servants : furthermore the Tugowners, who were the Port of London Authority, were in a monopoly position.

The above cited Judgment of Mr.Justice Hill stands up to the present day as the leading, indeed so far as I know the only, authority on this subject in English Law.

7. It is, of course, open to a superior Court to overrule the decision of Mr. Justice Hill in The "PRESIDENT VAN BUREN" cited above, or to limit its scope, but this is in my opinion very unlikely to occur having regard to the general approach of the English Courts to freedom of contract, of which Mr. Justice Hill's Judgment is a fair example.

With this qualification, I am in no doubt that the exculpatory clauses contained in the contract, copy of which is annexed to this affidavit and marked "F.D.B.1", and specifically the clauses quoted in paragraph 3 above, would be held by the English Courts not to be against the public policy of England and would on the contrary be upheld as prima facie valid and enforceable against Zapata Off-Shore Company should a cause of action be filed by said Company in England, either by way of original Award or by way of counterclaim, against Unterweser Reederei GMBH arising out of the casualty referred to in paragraph 4 above.

8. I have prepared this affidavit to the best of my art and skill and conscientiously believe the same to be true.

F.D. Bateson

F.D.Bateson.

SWORN TO AND SUBSCRIBED before me this tenth day of April, 1968.

A. J. Burgess

Notary Public in and for the City of London and elsewhere in England

(A. J. BURGESS)

GREAT BRITAIN AND NORTHERN IRELAND)
LONDON, ENGLAND) ss:
EMBASSY OF THE UNITED STATES OF AMERICA)

I, Frank J. Barrett Vice Consul of the United States of America residing at London, England, duly commissioned and qualified, do hereby certify that

ANT. J. BURGESS

whose signature and official seal are respectively subscribed and affixed to the annexed certificate, was on the date of the signing thereof of a Notary Public at London, England, duly authorized to perform notarial acts, duly appointed and qualified, to whose official acts faith and credit are due; that I have compared the signature of said

ANT. J. BURGESS

on the annexed certificate with a specimen of his signature filed in this Embassy; that I believe his signature to be genuine; that I have compared the impression of the seal affixed thereto with a specimen thereof filed in this Embassy, and that I believe the impression of the seal upon the said original annexed certificate to be genuine.

In witness whereof I have hereunto set my hand and affixed the seal of the Consular Service of the United States of America at London, England, this tenth day of April in the year of Our Lord one thousand nine hundred and sixty-eight.

Frank J. Barrett
Vice Consul of the United States of America at London, England.

Service Receipt No. A2643894

Tariff Item No. 48

Fee: $2.50 - 21s. 0d.

~~No fee prescribed.~~

LND/114
Jan.1968

"F. D. B. 1."

THIS IS THE EXHIBIT MARKED "F.D.B.1"
REFERRED TO IN THE AFFIDAVIT OF
FERGUS DINGWALL BATESON, SWORN TO THIS
10th DAY OF APRIL, 1968 BEFORE ME:

NOTARY PUBLIC
LONDON, ENGLAND
(A. J. BURGESS)

TOWAGE CONTRACT

(Daily Hire)

It is this day mutually agreed between

ZAPATA OFF-SHORE COMPANY, HOUSTON/TEXAS (hereinafter called "Owners")

and

UNTERWESER REEDEREI GMBH, BREMEN (hereinafter called "URAG"),

Owners of the ocean-going tug "BREMEN",

that the latter shall tow the Drill Barge "CHAPARRAL" (hereinafter called "Object")

Dimensions:		
length of barge hull		180'
overall length		205'
overall width of barge		205'
overall leg length		435'
hull draft	approx.	12'3
legs' draft	approx.	50'

from Venice (Louisiana)

to a point near Ravenna (Italy), as destined by "Owners".

1. a) Price

The "Owners" shall pay for such operation the sum of US$ 35.000,--
(say thirtyfivethousand US-Dollars)
and a daily hire rate of US$ 1.900,-- (say nineteenhundred US-Dollars)
for all time used by the tug counting from time of arrival at port of departure of the tow (Venice/La.) - not earlier than December 1st, 1967 - until delivery of the "object" at Ravenna.

b) Conditions of Payment

US$35,000 - on arrival of the tug at Venice, Louisiana.

Daily hire to be paid in instalments of 14 days in advance; first instalment being due and payable before the tow leaves Venice/La. Balance, if any, to be settled on delivery of the "object" at destination.

All payments to be made to Chase Manhattan Bank, New York, in favour of URAG.

2. Port Charges and Expenses

a) "Owners" to pay all costs for making the object ready for towing and expenses incurred by the tug and object - hereinafter called "the tow" - on leaving port of departure, at refueling ports "en route", and at arrival at port of destination as port charges, harbour dues, pilot charges, agency fees, Canal tolls, any non-German dues and stamp fees being assessed or levied on the towage price or otherwise arising out of this Agreement and/or service of assisting tugs, where necessary in the tug master's discretion or prescribed by Port Authorities.

b) Customs and/or export/import dues as well as insurance of the "object" shall be for account of the "Owners".

c) URAG shall pay all port charges, harbour dues, pilot charges, agency fees, Canal tolls and other expenses upon or in connection with the tug on arrival at the port of departure of the "tow and upon sailing from point of destination of the "tow" after delivery of the "object".

3. Towing Gear and Runner Crew

URAG to provide towing hawsers, bridles and other towing gear as deemed necessary for the towage service by URAG or their tug master.

URAG to provide a runner crew for the "object", consisting of one Marine Superintendent and 2 seamen. The crew shall be provided, at the "Owners'" expense with suitable accommodation, freshwater tanks, life saving appliances and all other requisites, in accordance with the requirements and conditions of the Marine Authorities of the countries concerned; provided, however, that URAG shall be solely responsible for the riding crew at all times.
"Owners" to pay URAG US$ 30,-- per man and per day, counting from the departure from Bremerhaven until arrival at Ravenna. Payment to be effected together with daily hire instalments as per clause 1 b).

4. Seaworthiness

"Owners" to have the "object" in a seaworthy condition for the proposed towage and an approved certificate to such effect issued by a competent and approved surveyor, is to be provided by the "Owners" to URAG or their master on arrival of the tug at port of departure, failing which "Owners" to pay URAG daily hire rate as per clause 1 for the delay involved.

If the towage cannot be started at all, due to "Owners'" inability to obtain the Certificate of Seaworthiness, "Owners" to pay URAG - besides the amount of US$ 35.000,-- (mobilization fee) - the daily hire rate of US$ 1.900,-- for the ballast homeward voyage of the tug to Bremerhaven. If the tug does not return directly to Bremerhaven, time for the return voyage shall be computed on the basis of the tug's normal running time to her port of destination by the customary route.

5. Port of Departure

The "object" shall be delivered to the tug at a place which the tug can safely approach and where she can safely lie always afloat and from where she is permitted to commence towage of the "object" in accordance with local regulations.

The decision of the tugmaster as to the suitability and fitness of any proposed place of delivery to be accepted by the "Owners" as conclusive.

6. Port of Destination

The "object" shall be taken over by the "Owners" or their authorized representative at a place which the "tow" can safely approach and where it can safely lie and manoeuvre, always afloat, and is permitted to go in accordance with local regulations.

7. No Salvage

In the event of the "object" breaking away from the tug during the course of this towage service, the tug shall stand by and render all reasonable service in reconnecting the towline without making any claim for salvage, unless circumstances arise beyond actual contemplation of the towage services.

8. Necessary Deviation

If the tow during the course of the towage puts into a port on account of unseaworthiness of the "object" or because of any other reason not being the fault of the tug, all costs including those for the tug shall be for account of the "Owners". Payment of daily hire as per clause 1 to be continued for all time involved in this deviation.

9. Lien for Towing Charges

URAG shall have an absolute lien on the "object" for the full towing charge and/or all additional compensations due to them under this Agreement including cost of recovery of same.

10. Liberties

The tug may at any time during execution of this contract go to the assistance of vessels in distress - unless such action would put the object under towage in distress - for the purpose of saving life or property, call at any port for fuel, repairs, supplies or other necessaries, or to land disabled seamen. Time spent by the tug under such circumstances shall be considered "off hire".

11. Penalties

URAG shall not be responsible for any consequences arising from the act or error of the "Owners" in connection with export or entry declarations in respect of the tow, and any penalty incurred by URAG or by the tug, her master, officers and crew by reason of such act or default of the "Owners" shall be reimbursed by the "Owners" to URAG in full and any delay caused to be compensated at the rate of daily hire as per clause 1 of this Agreement.

12. Claim and Suit

URAG and the tug, her owners, operators, managers agents, or charterers shall be discharged from liability unless any claim for loss, damage or delay is made in writing within fourteen (14) days from the date of arrival of the tow at destination, or termination of the tow for any reason whatsoever, and action at law or suit in Admiralty is brought to recover thereon within one (1) year after said loss or damage is claimed to have been sustained.

13. War Clause

In case of war, warlike events, restraints of rulers or similar events effecting shipping, URAG is entitled to obstain from the towage contract or from part of it, not yet executed. In this case "Owners" of the "object" acquire no claims against URAG.

14. All type-written inserts to be considered as part of this contract. Supplements and/or deletions valid only if initialed by both parties.

15. "General Towage Conditions" to be considered as integral part of this towage contract.

GENERAL TOWAGE CONDITIONS

1. For the execution of the towage contract it is agreed that the tug represents only the motive power of the towed object.

URAG, their masters and crews are not responsible for defaults and/or errors in the navigation of the tow.

2. a) For damages suffered by the tug the Owners of the towed object are responsible unless they prove that those damages are caused by default of the tug.

For loss or damages which the tug suffers through her own fault by collision with third parties the tug shall only be responsible in so far as such loss or damages are not occasioned or contributed to by the towed object.

b) Damages suffered by the towed object are in any case for account of its Owners.

c) Damages caused to third parties by the tug and/or the towed object are to be made good by the Owners of the towed object. This does not apply if they prove that damages are caused entirely by default of the tug.

3. The owners of the tug cannot be held liable if for unforeseen reasons the voyage cannot be started at all, if the commencement of the voyage is delayed or if any stay and/or delay occur during the voyage. The owners of the tug are particularly not liable for breaking or slipping of tow ropes and/or towing gear, premature shortage of bunkers on account of bad weather, delay, damages or loss due to the Act of God, Force Majeure, perils of the Sea, strikes, lock-outs, labour troubles, enemies, hostilities, war, epidemic, quarantine, embargo, restraint of any government, rulers or people, salvage operations or any other kind of assistance.

4. As far as the liability of the tug is excluded or has been taken over by the owners of the towed object, the latter are also under obligation of keeping the tug owners indemnified for all claims of third parties or to indemnify them for any claim already realized by them. This also applies if the owners of the towed object call on third parties and the latter try to recover against the tug owners.

subject to the special case, damages to the charterers based on the difference between the value of the cargo if put on board and delivered at Cardiff and its value unshipped.

The special case came before Bailhache, J., who found that the owners had committed a breach of contract by making the statement they did, and that the damages, found by the umpire, were the direct result of that breach of contract. Complaint is made of that finding on the ground, as I understand it, that the damages were really too remote and could not have been within the contemplation of the parties; and, again as I understand it, that argument is founded on the fact that there is inserted in the charter-party, in addition to the statement as to the estimated date when the vessel would be due to load, a cancelling date; and Mr. Somervell's contention is that where you find a cancelling date it is not within the contemplation of the parties that the damages, which are now claimed, should be claimable.

The answer to that, it seems to me, is that there are two contracts—one in reference to the date when the vessel was due to load, and the other in reference to the cancelling date, and that the parties must have contemplated payment of damages which directly flowed from a breach of either contract. If you find, as here, that these particular damages flowed directly from the breach of contract in reference to the due date, it seems to me that there is ample authority for saying that Bailhache, J., was right in holding, upon the umpire's findings, that the charters were entitled to succeed. Mr. Somervell has cited to us the case of Hobbs v. London & South-Western Rly. Co. L.R. 10 Q.B. 111, but I would remind him that Cockburn, C.J., at p. 117, said:—

> Therefore you must have something immediately flowing out of the breach of contract complained of, something immediately connected with it, and not merely connected with it through a series of causes intervening between the immediate consequence of the breach of contract and the damage or injury complained of.

On the facts found in the present case there was no series of causes intervening, but there was merely the direct consequence.

In these circumstances the appeal fails and must be dismissed with costs.

Lord Justice Scrutton and Lord Justice Atkin concurred.

ADMIRALTY DIVISION.

Tuesday, June 17, 1924.

THE "PRESIDENT VAN BUREN."

Before Mr. Justice Hill.

Tug and tow—Loss of port authority's tug by collision with tow—Towage agreement indemnifying tug owners against all claims—Tug owners' monopoly of available tugs—Whether towage agreement void as against public policy.

This case came on for trial on two preliminary questions of law. The suit involved a claim and counterclaim for damages arising out of a collision between the Port of London Authority's steam tug *Sirdar* and the United States Shipping Board's steamship *President van Buren* (then known as the *Old North State*), in Tilbury Main Dock, on Apr. 24, 1922. At the time the *Sirdar* was acting as one of the tugs engaged in the work of towing the *President van Buren* to the Shipping Board's appropriated berth in the dock. The plaintiffs, by their statement of claim, alleged that the collision (which was between the steamer's propeller and the tug's starboard side, and which resulted in the sinking of the tug) was solely caused by the negligent and improper navigation of the *President van Buren*. The defendants, on the other hand, attributed the collision solely to the negligent navigation of the *Sirdar* "by the plaintiffs or their servants."

The plaintiffs, in reply, pleaded that at all material times, the *President van Buren* was being transported and the services of the *Sirdar* were supplied under an agreement, dated Apr. 24, 1922, addressed to the plaintiffs' superintendent and signed by E. Shard on behalf of Mozan, Salt & Co., Ltd., as agents for the defendants.

The agreement provided *inter alia* that:—

> The masters and crew of the tugs and transport men shall cease to be under the control of the Port Authority during and for all purposes connected with the towage or transport, and shall remain subject in all things to the orders and control of the master or persons in charge of the vessel or craft towed or transported, and are the servants of the owner or owners thereof, who hereby undertake to pay for any damage caused to any of the Port Authority's property or persons and to hold, satisfy and indemnify the Port Authority against liability for all claims for loss of life or injury to persons or loss or damage by collision or otherwise to the vessel or to or by the vessel craft towed or to or by any cargo or other thing on board the same, or to or by any vessel, cargo or property of any other person or persons, or to the tug or tugs supplied, whether such damage, loss or injury arise or be occasioned by any accident or by any omission, breach

THIS IS THE EXHIBIT MARKED "F.D.B.2"

REFERRED TO IN THE AFFIDAVIT OF

FERGUS DINGWALL BATESON, SWORN TO
THIS 10th DAY OF APRIL, 1968
BEFORE ME :

NOTARY PUBLIC
LONDON, ENGLAND
(A. J. BURGESS)

...ulty, mismanagement, negligence or fault of any of such masters, crew or men, or any servant of the authority or any other person," or from or by any defect or imperfection in the tug or tugs supplied, or the machinery or ropes or tackle, or any other part of them, or any delay, stoppage or slackness of the speed of the same, however occasioned, or for what purpose or wheresoever taking place or by any other cause of any kind arising out of or directly or indirectly connected with the towage or transport.

On the application of the defendants, an order was made that two preliminary questions should be tried before the facts relating to the collision were gone into, namely (1) whether the agreement relied upon by the plaintiffs was valid and not void as against public policy, and (2) whether, even assuming those on board the *Sirdar* were guilty of negligence solely causing or partly contributing to the collision, the defendants nevertheless were liable for the whole of the damage occasioned by the collision.

Mr. C. B. Dunlop, K.C., and Mr. Lewis Noad (instructed by Mr. J. D. Ritchie) appeared for the plaintiffs, and Mr. L. Batten, K.C., and Mr. B. B. Stenham (instructed by Messrs. Thos. Cooper & Co.) represented the defendants.

Mr. DUNLOP said that if his Lordship decided that under the terms of the towage contract the defendants were liable for the damage done to the plaintiffs' tug, whether there was negligence on the part of the tug or not, it would become unnecessary hereafter to try the question whether, as the plaintiffs alleged, the negligence was solely that of the defendants' steamer.

Mr. Justice HILL: I know of no principle of public policy which prevents people of sound mind from entering into a towage agreement of this kind. Fortunately, English law regards business people as being of sound mind and capable of looking after themselves.

Mr. BATTEN, for the defendants, pointed out that there was no alternative contract in use in the London Docks, and only tugs in the permanent or temporary ownership of the Port Authority were permitted to be used in the docks. The agreement, which was forced upon shipowners, put a limitation on the right of free access to the docks. It was an attempt to do by agreement that which could not be done by Act of Parliament; and he submitted that the contract, on that ground, was against public policy. Further, on the construction of the contract, he contended that neither the damage to the tug nor the damage to the tow fell within the terms of the contract.

JUDGMENT.

Mr. Justice HILL, in giving judgment, said: In this case two preliminary questions of law have to be determined. The action is by the Port of London Authority, owners of the tug *Sirdar*; the defendants being the owners of the American steamship *President Van Buren*, which was formerly known by the name *Old North State*. The action arises out of a collision between the *Sirdar* and the *President Van Buren* at a time when the *Sirdar* was acting as one of the tugs engaged in the work of towing the *President Van Buren* in the Tilbury Main Dock. For the purposes of the two issues of law, it is assumed that there was negligence on the part of those in charge of the *Sirdar*, although, of course, the plaintiffs' case is that the negligence which caused the collision was solely that of those in charge of the *President Van Buren*.

There is a counterclaim by the defendants in respect of damage to their vessel on the basis that the collision was solely caused by those in charge of the *Sirdar*. But, assuming it should ultimately be found that there was negligence on the part of those in charge of the *Sirdar*, the plaintiffs set up a contract under which the *Sirdar* and a second tug were engaged by the agents of the owners of the *President Van Buren*, and they say that by the terms of that contract they are not liable for any damage done by reason of negligence of those in charge of the *Sirdar*, but that, on the contrary, though there might have been negligence on the part of those in charge of the *Sirdar*, nevertheless they are entitled to claim against the defendants in respect of the damage to the *Sirdar*. It was in these circumstances that the defendants asked that the two preliminary questions should be tried.

The first is whether the agreement set up by the plaintiffs is valid and not void as against public policy. The second is, assuming the agreement to be valid, whether, if the collision was solely caused or partly contributed to by negligence on the part of those in charge of the *Sirdar*, the defendants are nevertheless liable for the whole of the damage occasioned by the collision. The contract which was sent in and signed by Moxon, Salt & Co., Ltd., as agents for the owners of the *President Van Buren*, on the face of it, asked for the supply of tugs on the terms and conditions endorsed, which terms and conditions they agreed to be bound by. The conditions endorsed, so far as material, were in the following terms:—

> The masters and crew of the tugs and transport men shall cease to be under the control of the port authority during and for all purposes connected with the towage or transport and shall become subject in all things to the orders and control of the master or person in charge of the vessel or craft towed or transported and are the servants of the owner or owners thereof who hereby undertake to pay for any damage caused to any of the port authority's property or premises and to bear, satisfy and indemnify the port authority against liability for all claims for loss of life or injury to person or loss or damage by collision or otherwise to the vessel or to or by the vessel or craft towed or to or by any cargo or other thing on board the same or to or by any vessel cargo or property of any other person or persons or to the tug or tugs supplied, whether such damage loss or injury arise

or be occasioned by any accident or by any omission, breach of duty, mismanagement, neglect or default of any of such masters, crews or men or any servant of the authority or any other person or from or by any defect or imperfection in the tug or tugs supplied . . . .

Before considering the conditions, I should mention that the Port of London Authority are in control of the docks, that they own or hire the tugs used in the docks, the *Sirdar* being one of the tugs owned by them, that they supply all tugs for dock work and will not allow any outsider to do the work, and that whenever they do supply tugs they must agree to the terms contained in this contract. The United States Shipping Board, the defendants, had an appropriated berth in the Tilbury Dock and were in the habit of using the Port Authority's tugs in that connection, and the *Sirdar* was one of the tugs they usually employed.

On the first point as to whether the agreement is valid and not void as against public policy, I think the answer on that matter is that which I have already expressed, namely, that the English law, in my view, very fortunately regards business men as capable of knowing their own business and of making contracts for themselves, and it sees no objection to let the power of capable people to make what contracts they like. In truth, as we know, a contract in this form, or in a practically similar form, has become for a good many years part of almost universal use by tug owners, and whether a tug owner supplies a tug on these terms or on terms which reserve liability to himself (where he does it) it is only a question of price. If he is to have no liability, he can do the work very cheaply, if he is to run all the risks then of course his reward must be sufficient not only to compensate him for the work he does but to cover the insurance and, in fact, all the risks he runs. I can conceive no principle of public policy which should lead the Courts to say: "We ought to step in and say 'This or that contract ought not to be made by competent people,'" when the people making it are competent people. It is said that the Port of London Authority is a monopoly. It is said that everybody has a right to the use of the tugs on equal terms, but here, it is said, you cannot employ any other tugs than the Port of London Authority's tugs. There it is. If you do not like these terms and if they are too onerous, nobody forces you to use the Port of London Authority's docks. I do not like to enlarge upon it because it seems to me to be so clear that, if you are talking of public policy, the highest interest of public policy is that the law should not interfere with the transactions of business men when it can help it.

Mr. Dunlop has pointed out that there is a section—195, I think—in the Port of London Authority (Consolidation) Act, 1920, which—I have not considered it, but I think very likely—may give any person, who feels himself aggrieved by being asked to enter into contracts of this kind, power to appeal to the Board of Trade, who may direct an inquiry, and it may be that if there is a grievance there is a means of getting the matter considered and remedied, if there is something to remedy.

The form of contract aims, in the first place, at making the master and crew of a tug for the time being the servants of the ship which is being towed, in the second place its aim is to deal with damage caused to the Port Authority's own property, and in the third place its aim is to deal with liabilities which may be incurred by the Port Authority by reason of damage to other people's property or to life. If the first section, which begins: "The masters and crews of the tugs" and ends "are the servants of the owner or owners" of the vessel towed, is effectual to do that which it sets out to do, it does not much matter what the rest of the conditions provide because it will be that which the Port of London Authority contemplates and if it effectually makes the masters and crews of tugs servants of the ship which is being towed—servants for the time being—then it will follow that the owner of the tow cannot claim for damage brought about by people who for the time being are his own servants and he must also be liable for damage caused to the authority's property by persons who for the time being are his servants, the servants of the owners of the tow.

I have considered Mr. Batten's criticism. I think that clause does do what it sets out to do, and I think it sets out in terms that for all purposes connected with the towage the masters and crews of tugs are the servants of the owners of the tow. I do not think that can be limited in the way Mr. Batten suggests. I think it provides that for the purposes of the towage and for all purposes connected with the towage they are the servants of the owners of the tow. That, I think, is enough to show that for any negligence of those in charge of the *Sirdar*—the master and crew of the *Sirdar*—the owners of the *President Van Buren* are liable to the authority, that is to say, for any damage to the *Sirdar*, and cannot themselves claim in respect of any damage done to the *President Van Buren*.

I think it is also made quite clear by what follows that the owners of the tow undertake to pay for any damage caused to any of the Port of London Authority's property or premises. Thinking, as I do, that a portion of the conditions deals with the Port of London Authority's own property and is in contrast with the following part which deals with the liability of the Authority to other people, I see no reason for excluding from the general description of the Port of London Authority's property their tugs, and in my view, therefore, the owners of the tow, the *President Van Buren*, have undertaken to pay for damage caused to the Port of London Authority's property, the tug *Sirdar*.

In the third portion of the conditions they likewise undertake to bear loss or damage by collision to the vessel towed, and that includes all damage to the *President Van Buren*.

I must therefore answer the issues by

(1) that the agreement is valid ... that, if those on board the *Sadie* ... negligent by their causing the collision ... contributing to the collision, the defendants are liable to the plaintiffs for the whole of the damage occasioned by them. I think that is the right way to answer the question as it is submitted, and, that being so, there will be judgment for the plaintiffs on the claim and counterclaim.

Mr. Noad observed that he wished to make it clear that, in effect, this was in no sense an interlocutory judgment.

His Lordship said that strictly he had only to decide the issues, but he gathered that Mr. Noad intimated that the practical result would be, as to the collision, that there was judgment for the plaintiffs on the claim and counterclaim, with costs.

ADMIRALTY DIVISION.

Wednesday, June 15, 1921.

THE "KELSOMEAD."

Before Mr. Justice Hill.

Collision—Objection to Registrar's report—Thrust shaft of plaintiff steamer broken—Whether breakage a consequence of the collision.

In this case, the plaintiffs, the owners of the steamship *Marquess*, moved in objection to the Registrar's Report, assessing the damages payable to them in respect of a collision between the *Marquess*, while at anchor, and the defendants' steamship *Kelsomead*, at Montevideo on May 17, 1921. Liability for the collision was admitted by the defendants, and, before the Registrar, the plaintiffs put in a claim totalling £12,953. The Registrar allowed only £5419. The plaintiffs now took exception to the report as regarded some thirteen items of their claim, two of which the Registrar had disallowed *in toto* and in regard to the remainder of which he had allowed only portions of the sums claimed. The defendants gave cross notice of motion in respect of a number of items which they contended consisted of expenses which were not incurred in consequence of the collision. The dispute largely turned upon the question of whether the thrust shaft of the *Marquess*, which broke while the vessel was on her way home from Montevideo to London, and had to be replaced, broke in consequence of the collision.

The Registrar held that the plaintiffs had not proved that the injury to the shaft was the result of the collision. The plaintiffs now contended that the proper inference to draw from the evidence and admitted facts was that the breaking of the thrust shaft was a consequence of the collision, and that the Registrar was wrong in disallowing the expenses in connection with renewing it in London.

Mr. A. D. Bateson, K.C. and Mr. I. H. Stranger (instructed by Messrs. Downing, Middleton & Lewis) appeared for the plaintiffs; and Mr. G. P. Langton (instructed by Messrs. Ingledew, Sons & Brown) represented the defendants.

The arguments were not concluded, and the hearing was adjourned.

ADMIRALTY DIVISION.

Friday, June 29, 1921.

THE "UGO BASSI."

Before Mr. Justice Hill, sitting with Captain T. Gosling, C.B.E., and Captain G. Gregory, C.B.E. D.S.O., Elder Brethren of Trinity House.

Collision in dense fog — Disputed speeds — Whether steamer right to go in fog from anchorage in bay into frequented waters.

This case involved a claim and counterclaim for damages arising out of a collision between the French steamship *Berrille* and the Italian steamship *Ugo Bassi*, in the English Channel, off the Cornish coast, shortly before or at about midnight of Sept. 29-30, 1923.

Mr. D. Stephens, K.C. and Mr. H. C. E. Dumas (instructed by Messrs. Stokes & Stokes) appeared for the plaintiffs; and Mr. A. D. Bateson, K.C., and Mr. Lewis Noad (instructed by Messrs. Gilbert Robertson & Co., of Cardiff, Messrs. Wm. A. Crump & Son, agents) represented the defendants.

According to the plaintiffs' case, at about midnight (G.M.T.) on Sept. 29-30, 1923, the *Berrille*, a twin screw steel steamship of 1965 tons gross register and of the length of about 276 ft., was in the English Channel, bound from Caen to Newport with a cargo of about 1850 tons of steel billets. The weather was a dense fog, the wind about W.N.W. light airs, and the tide ebb running to the S.W. with the force of a little less than a knot. The *Berrille*, which had been aground in Coverack Bay a little to the northward of Dolores Point, had, after getting afloat again and then anchoring for a time, again got under way and was steering a course of S. 70 E. true to get well clear of the land before resuming her course for the Lizard. With engines working as slow as possible she was making a speed of one to one-and-a-half knots. She was duly exhibiting the regulation masthead and side lights for a steamship under way, including an optional additional masthead light and a fixed sternlight, all of which were burning brightly. A good look-out was being kept and the whistle was being sounded for fog at short and regular intervals.

In these circumstances those on board heard the prolonged blast of a steamship's whistle, apparently a considerable distance

Filed, Tampa, Fla., Oct. 2, 1968 No. 68-290-Civ-T

MOTION TO STAY FURTHER PROSECUTION OF THE CAPTIONED PROCEEDING

Plaintiff, UNTERWESER REEDEREI, GmbH, moves the Court for entry of an Order staying the further prosecution of the claim filed by Zapata Off-Shore Company in the captioned proceeding for Exoneration From or Limitation of Liability, and as grounds therefor would show as follows:

1. Plaintiff, UNTERWESER REEDEREI, GmbH, was initially brought before this Court in contravention of a contractual agreement between the Plaintiff and the claimant, Zapata Off-Shore Company; as a consequence, Plaintiff was compelled to file its Complaint in this cause, praying for Exoneration From or Limitation of Liability in order to comply with the statutory period of limitation set forth in Title 46, United States Code, Sections 181 et seq.

2. There is now pending in the High Court of Justice, Admiralty Division, London, England, a suit brought by Unterweser Reederei, GmbH, against Zapata Off-Shore Company. This action was instituted by Plaintiff in compliance with its contractual agreement with Zapata Off-Shore Company to litigate all disputes arising out of the Towage Contract in the High Court of Justice, London, England.

3. Concurrently herewith Plaintiff files its Memorandum of Law in support of this Motion; in said Memorandum the foregoing grounds, the legal issues presented and the relevant law are fully developed and set forth.

WHEREFORE, Unterweser Reederei, GmbH, prays that this court enter its order staying the further prosecution of the claim filed in this proceeding by Zapata Off-Shore Company pending final determination of the action now proceeding in the High Court of Justice, London, England.

David C. G. Kerr

DAVID C. G. KERR Of
MACFARLANE, FERGUSON, ALLISON & KELLY
P. O. Box 1531, Tampa, Florida 33601
-and-
FARIS, ELLIS, CUTRONE, GILMORE & LAUTENSCHLAEGER, Whitney Building
New Orleans, Louisiana 70130
ATTORNEYS FOR PLAINTIFF

IN THE HIGH COURT OF JUSTICE

PROBATE, DIVORCE AND ADMIRALTY DIVISION 1968 Folio 64

(ADMIRALTY)

Royal Courts of Justice,

Thursday, 4th July, 1968.

Before: Mr JUSTICE KARMINSKI

Between: UNTERWESER REEDEREIL GESELLSCHAFT MIT BESCHRANKTER HAFTUNG Plaintiffs

-and-

ZAPATA OFF-SHORE COMPANY Defendants

The "CHAPARRAL"

(Motion)

(Transcript of the shorthand notes of E. Smith, deputy to V.T. Vincent, (of James Towell & Sons, 36/37, Furnival Street, London, E.C.4) Official Shorthandwriter to the Admiralty Court)

Mr A. LLOYD, Q.C., and Mr J. COOKE, instructed by Messrs Richards, Butler & Co., (London) appeared on behalf of the Plaintiffs.

Mr K.S. ROKISON, instructed by Messrs Thomas Cooper & Co., (London) appeared on behalf of the Defendants.

J U D G M E N T

(Revised)

1

EXHIBIT "B"

MR JUSTICE KARMINSKI: This is a motion on behalf of the Defendants, the Zapata Off-Shore Company, to set aside writ issued in this country and an Order for its service outside the jurisdiction, on three grounds: First, that this Court - that is, the English Court - is not a convenient forum for the determination of the dispute concerned in the action: secondly, that the proceedings have already been commenced in a foreign Court, namely, the United States District Court in and for the Middle District of Florida, Tampa Division; and thirdly that the purported service of the notice of the said writ on the Defendants and all subsequent proceedings in the action may be set aside on the grounds already mentioned and/or the further ground that the copy of the writ was not served on the Defendants or their appointed agents for such service; and the Defendants ask for costs of the action and of this application to be taxed.

The dispute arose out of a towage contract entered into between the Plaintiffs, a limited company incorporated in the Federal German Republic, and the Defendants, the Zapata Off-Shore Company, who are incorporated under the law of the State of Delaware and have a registered office in that State but carry on their business in Houston, Texas.

The contract was to tow an oil drill from Venice, Louisiana, to Ravenna in Italy, but difficulties arose as to the towage, and the operation got no further than some position in the Gulf of Mexico. It then became necessary to go to the port of Tampa in the State of Florida as a port of refuge; and there the Defendants' tug was arrested and proceedings were started in the Federal District Court there.

In due course a writ was issued, a month or so later,

EXHIBIT "B"

in this country. Meanwhile, the Plaintiffs applied to stay the proceedings in the Federal District Court of Tempe. Argument was heard there some weeks ago, but judgment has not yet been given.

The Plaintiffs meanwhile had issued their writ here, and it is that writ which it is sought to set aside, together with the Order directing service on the Defendants in the United States. A good deal of difficulty was experienced in service on the Defendants, and one of the matters which has been much canvassed before me on behalf of the Defendants is whether or not notice was properly served. I think it is desirable to deal with that at once.

There were two efforts to serve, one in Houston, Texas, and the other in Delaware. I am satisfied that the service of the Order, or the notice of it, in Delaware was good under Delaware law: there is evidence by affidavit to support that. But the matter has been admirably argued by Mr Rokison for the Defendants, that the notice was not properly served because there is no evidence to show that the procedure is the same for service or notice of a foreign writ. If there had been any force in that argument, I apprehend that I should have had some evidence in support from the Defendants' side. It has been said that in some way, which I do not understand, the service of the notice may be an offence against the Constitution of the United States. But what was done here was that notice was served on a proper officer of the agents of the Defendant Company, which I find to have been good service under the law of Delaware. There is nothing which I can find which indicates at all that there are some other requirements for serving foreign writs in the jurisdiction of that State(

EXHIBIT "B"

I therefore find as a fact that the service of the notice in Delaware was good service. I make no finding as to the other service at Houston.

Mr Lloyd submitted that if I were not satisfied with this service I should now make an Order for substituted service but as I have found that there has been good service, there is no need to my mind for a further Order for substituted service.

I return briefly to the contract which was executed between the parties in this case. It was a contract for towage in a form which, I imagine, is not uncommon. What is material is the last of the general towage conditions, which expressly stipulates that any dispute arising must be treated before the London Court of Justice. Apparently there had been some negotiation as to the proper course to be adopted in the unhappy event of a dispute. It was said that the Plaintiff Company usually requires resort to the German Courts, but by way of compromise they agreed to London as the forum to be used. But it is said on behalf of the Defendants that in spite of the contract it would be wrong to allow that agreement to be carried out without at least some reference to other material matters. It is alleged that the Plaintiffs here have to some extent taken part in the Florida proceedings. That is true: they have indeed filed a Petition for Limitation, because if they did not do that within a certain time, namely six months, they would be out of time for limitation before that tribunal. But I have no doubt at all that they have taken no steps in the Florida Court at Tampa, except to protect their position for the future.

For the Plaintiffs, Mr Lloyd argued that the parties should be at least encouraged to stick to their agreement,

and he called my attention to a line of cases which emphasised that point of view. It is, I think, necessary for me to refer only briefly to a decision of Sir Samuel Evans, President, in the "Cap Blanco", 1913 (Probate) 130. At page 136 the President said this: "In dealing with commercial documents of this kind, effect must be given, if the terms of the contract permit it, to the obvious intention and agreement of the parties. I think the parties clearly agreed that disputes under the contract should be dealt with by the German tribunal, and it is right to hold the plaintiffs to their part of the agreement. Moreover, it is probably more convenient and much more inexpensive, as the disputes have to be decided according to German law, that they should be determined in the Hamburg Court".

Mr Rokison rightly emphasised that the President was not resting his decision solely on the ground of the agreement between the parties, but called attention to what was in that case the fact, namely that the German Court in Hamburg was in the circumstances convenient to the parties. I accept at once - and so did Mr Lloyd - that the position of the issue of convenience is material to be considered and that the agreement of the parties does not conclude the matter. Mr Rokison relied on The "Fehmarn", 1957 W.L.R. and 1958 W.L.R. It is not necessary to consider in detail the facts of that case, but it was a question of a cargo of turpentine which was discovered to be contaminated in the course of a voyage. The vessel was a German one, but the turpentine came from a port in Russia; the plaintiffs were an English company who were the holders of a bill of lading. It was held there that the English courts had jurisdiction, and accordingly the writ of summons should not be set aside, although the parties had agreed that any claims

EXHIBIT "B"

end disputes should be judged in the Soviet Union of Russia. That, Mr Rokison argued, shows quite clearly that the Courts will in proper circumstances depart from the agreement entered into between competent parties when the circumstances warrent it. I accept at once that in cases of this kind the contract by itself is not conclusive. If it could be shown that other circumstances made it fair and right that the contract should be departed from, the Court in its discretion could do that very thing.

My attention was called to other and later authorities, two quite recent. In Meckender and Others v. Feldis A.G. and Others, [1967] 2 Q.B., it was held by the Court of Appeal that in the circumstances in that particular case, which stemmed from non-disclosure, it would not be right to give leave to serve the writ out of the jurisdiction. It is, I think, necessary to refer only briefly to the judgment of Lord Justice Diplock, who having dealt with non-disclosure, came to the conclusion that Mr Justice McNair had taken the wrong view of English law and apparently the wrong view also of the effect of Belgian law. The Court of Appeal therefore was entitled to exercise its discretion de novo. On the particular facts of that case they upset the judgment given below, and dealt with the matter in that way.

The last case which I think it is necessary to refer to, dealt with the somewhat different point as to the law applicable. That was Tzortzis and Another v. Monark Line A/B, heard in the Court of Appeal in January of this year and reported in (1968) 1 W.L.R. 406. That was an arbitration case. A dispute arose, and each party appointed an arbitrator; a third was appointed by the High Court here. But the question arose as to which law was to be applied.

EXHIBIT "B"

It is necessary to refer briefly to the judgment of Lord Justice Salmon. He said that where parties had agreed as to the place, then it was a proper inference that the law applicable should be the law of the country in which the parties wish to have the case tried; in that case, English law. I do not think that case takes me much further in relation to this matter.

I went to deal now with the question of the matters on which I find I have a discretion and to see whether in all the circumstances it would be right here to depart from the terms of the contract, having regard to the balance of convenience. Mr Rokison pointed out that in this case the balance of convenience so far as witnesses were concerned pointed in the direction of having the case heard and tried in the United States District Court at Tampa in Florida because the probability is that most, but not necessarily all, of the witnesses will be American. The answer, as it seems to me, is that a substantial minority at least of witnesses are likely to be German. The tug was a German vessel and was, as far as I know, manned by a German crew, judging by the names of some of them. Where they all are now or are likely to be when this matter is litigated I do not know, because the experience of the Admiralty Court here strongly points out that maritime witnesses in the course of their duties move about freely. The homes of the German crew presumably are in Germany. There is probably a balance of numbers in favour of the Americans, but not, as I am inclined to think, a very heavy balance.

It is said that the documents likewise are all in the United States. It is also said that there is a risk here of double litigation and we are faced with a lis alibi pendens. How far that is right depends, it seems to me, on

EXHIBIT "B"

the judgment to be given at some future date by the United States District Court at Tampa.

It is said also that the enforcement of the judgment, certainly if the plaintiff wins, would be more difficult here and rather easier in the United States. The Defendants have no business here, although there apparently is some kind of associate company in this country, but it is said that their chances of recovering are somewhat remote. That, as it seems to me, is a matter of choice for the Plaintiffs. They must consider that risk; and I have to look at the general picture and at the question of convenience, which I have summarised, and then come to a decision as to whether or not the balance of convenience here liberates the parties from their agreement to resort to what is called in the contract "the London Court of Justice". I have tried in this case to deal with the balance of those matters. The force of an agreement for litigation in this country, freely entered into between two competent parties, seems to me to be very powerful.

Mr Lloyd said he could find no reported case where, in an English reference, that agreement had been departed from. I ventured to point out that the absence of litigation on a particular point was seldom conclusive. It is interesting, but no more, that that apparently is the position. But I have approached the matter with, I hope, an unprejudiced mind - that is, unprejudiced by past history - and I have come to the clear conclusion here that the parties should, even after giving full consideration to the matters of convenience and the other matters concerned here, stick to their bargain. Having come to that conclusion, this motion fails and must be dismissed.

MR LLOYD: My Lord, I ask for the costs of the motion.

EXHIBIT "B"

MR JUSTICE KARMINSKI: What do you say, Mr Rokison?

MR ROKISON: I do not think I can object to that, my Lord.

MR JUSTICE KARMINSKI: No.

MR LLOUD: I am obliged. I am sure your Lordship's judgment will be considered very carefully by the Courts in Tampa.

EXHIBIT "B"

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL
CIVIL DIVISION

Royal Courts of Justice,
Tuesday, 23rd July, 1968.

Before:

LORD JUSTICE WILLMER,
LORD JUSTICE DIPLOCK and
LORD JUSTICE WIDGERY.

Between:

UNTERWESER REEDEREI GESELLSCHAFT
MIT BESCHRANKTER HAFTUNG Plaintiffs

and

ZAPATA OFF-SHORE COMPANY Defendants

"THE CHAPARRAL"

- - - - - - -

JUDGMENT

EXHIBIT "C"

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL
CIVIL DIVISION

Royal Courts of Justice,
Tuesday, 23rd July, 1968.

Before:

LORD JUSTICE WILLMER,
LORD JUSTICE DIPLOCK and
LORD JUSTICE WIDGERY.

Between:

UNTERWESER REEDEREI GESELLSCHAFT MIT BESCHRANKTER HAFTUNG — Plaintiffs

and

ZAPATA OFF-SHORE COMPANY — Defendants

"THE CHAPARRAL"

(Transcript of the Shorthand Notes of THE ASSOCIATION OF OFFICIAL SHORTHANDWRITERS LIMITED, Room No.392. Royal Courts of Justice, and No.2, New Square, Lincoln's Inn, London, W.C.2).

Mr ANTHONY J.L. LLOYD, Q.C., and Mr JULIAN H.S. COOKE (instructed by Messrs Richards & Butler) appeared on behalf of the Plaintiffs (Respondents).

Mr FRANCIS P. NEILL, Q.C., and Mr KENNETH S. ROKISON (instructed by Messrs Thomas Cooper & Co.) appeared on behalf of the Defendants (Appellants).

JUDGMENT

LORD JUSTICE WILLMER: We need not trouble you further, Mr Lloyd.

This is an application for leave to appeal from an order made by Mr Justice Karminski on the 4th June last whereby he dismissed the defendants' application to set aside an order of the learned registrar giving leave to serve a writ out of the jurisdiction. In order to deal with the application it has been necessary to go into all the circumstances of the case and in substance, to hear the appeal.

The question at issue between the parties arises out of a marine casualty which took place in January of this year. The plaintiffs are well known towage contractors and owners of a tug called the BREMEN. The defendants are a company incorporated in the United States of America who carry on business inter alia in the operation of oil rigs.

EXHIBIT "C"

In November 1967 the plaintiffs and the defendants entered into a contract in writing for the towage of an oil rig called the CHAPARRAL belonging to the defendants from a place called Venice in Louisiana to Ravenna in Italy by the tug BREMEN. We have been referred to a number of clauses in the contract, only one of which need be mentioned now. The concluding provision of the contract was: "Any dispute arising must be treated before the London Court of Justice".

The towage from Venice began on the 4th January this year. By the 9th January, when the tow was still within the Gulf of Mexico disaster overtook it, and it was necessary to take refuge in the port of Tampa in Florida. Each party blamed the other for the disaster which occurred, and each has asserted a claim for damages. The plaintiff tug owners say that the defendants were at fault in that the oil rig being towed was not in a seaworthy condition. The defendants on their part say that the tug was not seaworthy to undertake the voyage, and also that it was negligently operated. There are all the elements present for an interesting battle to ascertain whose fault it was. The defendants got their blow in first, because immediately upon arrival of the tug and tow at Tampa they instituted proceedings in admiralty in the United States District Court at Tampa, and in the course of those proceedings the tug was arrested. The release of the tug was eventually obtained upon security being furnished satisfactory to the defendants in the sum of $3,500,000.

On the 21st February 1968 the plaintiffs issued the writ in the present action and sought leave to serve that writ out of the jurisdiction on the American owners of the oil rig. Leave to serve the writ out of the jurisdiction was obtained from the learned registrar, and it was that matter which came before the learned judge. The grounds upon which the plaintiffs sought leave to serve the writ out of the jurisdiction were, first, that the contract was one which "by its terms, or by implication, was governed by English law", and secondly, that the contract contained an express term to the effect that the High Court should have jurisdiction.

In the meantime, however, the present plaintiffs had taken steps to defend themselves in the proceedings which were being carried on in Tampa. Those proceedings involved taking depositions from a number of witnesses, and in that operation both the present plaintiffs and the present defendants took part. Depositions appear to have been taken from a considerable number of witnesses But from an early date the plaintiffs took exception to the jurisdiction of the court at Tampa and instituted proceedings to set aside or stay the American action. Those proceedings came before the United States District Court in Tampa on the 28th April of this year, when judgment was reserved. Up to date, so far as we have been informed, no judgment has yet been delivered, and it is not, therefore, known whether the action instituted by the defendants in America will be set aside or stayed. At present, however, assuming that leave to serve this writ out of the jurisdiction stands, there is a situation when proceedings are on foot in both countries. The position is further complicated by the fact that, just before the matter came before Mr Justice Karminski at the beginning of this month, the plaintiffs launched proceedings for exoneration or limitation of their liability in the United States of America. It is to be pointed out that that is a course which they had to take (if the American proceedings were allowed to continue) within six months of the institution of those proceedings. Time was running out against them, and they were, therefore, forced to institute those proceedings at the beginning of this month in order to preserve their rights.

The learned judge knew of the institution of those proceedings, but he did not actually know (although I have no doubt that he had good reason to suspect) that immediately following the institution of those proceedings an order would be made by the American court which, amongst other things, enjoined the defendants against prosecuting any claim of theirs against the plaintiffs pending the determination of the plaintiffs' limitation proceedings. That, it has been said, would effectively prevent the defendants, if they were so minded, from putting forward a counterclaim in any proceedings in this country. That is a matter much relied upon by the

defendants as showing that, as a matter of convenience, and in order to avoid duplication of proceedings, leave ought not to be granted to serve this writ out of the jurisdiction.

Reliance is also placed upon the fact that, under American procedure, it appears that a party sued as a defendant there (as are the present plaintiffs) who has a counterclaim against the plaintiff in that country is compelled to assert that counterclaim within a certain limit of time, or he will be for all time barred. That is another reason why it is suggested on behalf of the defendants that, as a matter of convenience, proceedings ought not to be allowed to continue in this country, since it is said that it will be necessary for the present plaintiffs to assert their claim by way of counterclaim in the United States.

The law on the subject, I think, is not open to doubt, and I do not think that it is really necessary to cite the authorities to which we have been referred. It is always open to parties to stipulate (as they did in this case) that a particular court shall have jurisdiction over any dispute arising out of their contract. Here the parties chose to stipulate that disputes were to be referred to the "London" court, which I take as meaning the High Court in this country. Prima facie it is the policy of the court to hold parties to the bargain into which they have entered. Prima facie it is to be presumed, therefore, that the plaintiffs should have leave to prosecute their proceedings in this country, and in pursuance of that to serve their writ out of the jurisdiction. But that is not an inflexible rule, as was shown, for instance, by the case of THE FERNARN, in which I was myself concerned, and which came to this court. That was a case in which the court in its discretion declined to give effect to a stipulation made by the parties in their contract conferring jurisdiction on a foreign court.

I approach the matter, therefore, in this way, that the court has a discretion, but it is a discretion which, in the ordinary way and in the absence of strong reason to the contrary, will be exercised in favour of holding parties to their bargain. The

question is whether sufficient circumstances have been shown to exist in this case to make it desirable, on the grounds of balance of convenience, that proceedings should not take place in this country, the stipulated forum, but that the parties should be left to fight their battles in the United States of America.

The learned judge in his discretion came to the conclusion that it was proper to grant leave to serve the writ out of the jurisdiction so that the action might proceed in this country. We in this court should not interfere with the judge's exercise of his discretion unless it is shown that he acted on some wrong principle, or misapprehended the facts, or unless it is shown that his exercise of his discretion was plainly wrong.

It is said that the situation has to some extent altered, since the time when the learned judge had the matter before him, by reason particularly of the plaintiffs' institution of exoneration and limitation proceedings in the United States to which I have refefred. That is the only new factor which has arisen since the time when the learned judge delivered his judgment.

I am unable to see that the judge acted on any wrong principle. I do not think that the new facts said to have been brough to light really alter the complexion of the case to any material extent, nor am I prepared to say that the judge's exercise of his discretion is shown to have been plainly wrong.

I should record the fact that in an affidavit put in on behalf of the plaintiffs today the offer is made (and Mr Lloyd on behalf of the plaintiffs has renewed it in the course of the argument to waive the provisions of the restraining order which has been obtained by the plaintiffs in the United States so as to relieve the defendants of any difficulty which they might otherwise have in putting forward a counterclaim in this country if they want to. I should also record the fact that an offer has been made on behalf of the plaintiffs (which still holds good) to hold the security which has been furnished in America as available to cover any counterclaim which may be brought in this country. I refer to those

two circumstances because I think that they are in their turn relevant to the question whether it is right to allow these plaintiffs to pursue their action in this country in accordance with their contractual bargain. I think that it is, and that the learned judge reached the right conclusion.

In the circumstances I think that the appropriate order for us to make is that the defendants be granted leave to appeal, but that the appeal be dismissed.

LORD JUSTICE DIPLOCK: I agree, and add very little.

It has long been recognised that the jurisdiction of the High Court to give leave for service of a writ, or notice of a writ, out of the jurisdiction under Order 11, rule 1, is one which should be exercised with caution, because there are circumstances set out in that rule in which service outside the jurisdiction is authorised which are in conflict with the ordinary rules of comite, that is to say, the courts in this country assert a jurisdiction in themselves wider than that which they recognise in the courts of other countries. That need for caution has been frequently expressed It was expressed by Lord Justice Farwell fifty years ago in THE HAGEN, reported in 1908 Probate Division, 189, at page 201, and has been re-asserted fairly recently by this court in 1967 in Mackender v. Feldia A.G. reported in 1967 2 Queen's Bench Division, 590.

Those observations should be read in relation to an application for service out of the jurisdiction under rule 1. Rule 2, which is a separate rule and applies to this case, authorises service out of the jurisdiction where the contract contains a term to the effect that the High Court has jurisdiction to hear and determine any action in respect to the contract. This does not raise any question of conflict with ordinary comity because, so far as I know, it is the policy of the courts of most countries, if it be reasonable at any rate to do so, to see that parties keep their word; and having had the privilege of reading a memorandum brief which has been accepted in the Federal District

Court at Tampa on behalf of the plaintiffs in this action, it looks to me as if there is some ground at any rate for saying that the Federal courts and State courts in the United States take the same view.

When it comes to a case under Order 11, rule 2, as distinct from a case under Order 11, rule 1, I say again in this case, as I said in Mackender: "Where parties have agreed to submit all their disputes under a contract to the exclusive jurisdiction of a foreign court, I myself should require very strong reason to induce me to permit one of them to go back on his word". We should, I think, apply the same principle whether the forum of contractual choice is England or of some other country. The question arises more frequently before us where the forum of contractual choice is some other country, as in Mackender's case, where the choice was Belgium. In the present case the choice of the parties was the English court and, as I say, I should myself require strong grounds for ~~strongs for~~ saying that one of the parties should not keep his word.

There is, of course, undoubtedly a discretion on the part of the court in this case to refuse to allow service of the writ outside the jurisdiction despite the contractual term in the contract. The learned judge from whom this appeal is brough recognised that he had a discretion. So far as I can see he applied his mind to all the relevant matters and, even if I myself might have come to some other conclusion, I do not think that any ground has been put forward which would justify the court in interfering with his discretion. Having said that, let me say (as must have been apparent during the course of this hearing) that I agree entirely with his decision. I should have done the same myself.

LORD JUSTICE WIDGERY: I agree with both judgments. The parties here have quite deliberately chosen that their disputes shall be decided in the courts of this country, and it would need strong grounds in my view to deprive either party who sought to take advantage of that course from receiving the advantage which he

expects from it. I also would put my decision on the footing that there is no reason here to suppose that the learned judge exercised his discretion improperly. But, like my Lord, I feel that had I had to decide the matter myself, I should have reached precisely the same conclusion.

I also would dismiss this appeal.

Mr LLOYD: I have to ask for the costs of the appeal, my Lord.

LORD JUSTICE WILLMER: Yes; I think that follows.

Mr NEILL: As a matter of technicality, I think that two of your Lordships said "Appeal dismissed". Does it follow, my Lord, that you granted leave to appeal ?

LORD JUSTICE WILLMER: Thank you for reminding me; I am afraid that it had slipped my mind that the whole matter was before us.

Mr NEILL: Sometimes the two arguments run into one another, and that did happen here.

Mr LLOYD: I would rather like your Lordships to say that this is a case in which leave should not be given, though I do not think that it very much matters. There is the danger that leave will be treated as being automatic. I would submit that leave was required, and the learned judge who heard the case did refuse leave. I ask your Lordships, having heard my friend's argument, to say that leave ought not to be given.

LORD JUSTICE DIPLOCK: You have had a long obiter judgment, Mr Lloyd.

(Their Lordships conferred).

LORD JUSTICE WILLMER: I think that is right. I think that we must grant leave, but on the hearing of the appeal we dismiss the appeal.

LORD JUSTICE DIPLOCK: Costs will probably tax higher on that footing.

Mr LLOYD: I suppose there will be some separate costs of the application for leave to appeal.

LORD JUSTICE WILLMER: Well, there was a notice of motion; I do not know how much costs that carries.

---oOo---

Filed, Tampa, Fla., Jan. 21, 1969 No. 68-290 Civ. T.

ORDER

THIS CAUSE came on for consideration upon a Motion for Injunction filed by Zapata Offshore Company, claimant, and a Motion to Stay filed by Unterweser Reederei, plaintiff. The Court having reviewed the excellent briefs submitted and having heard argument of counsel, determines that the injunction prayed for should be granted, and the Motion to stay should be denied. As the basis for this determination the Court makes the following observations and conclusions.

I
STATUS OF PROCEEDING

The present controversy finds its origin in a mishap that occurred in the Gulf of Mexico on January 9, 1968. On January 12, 1968, Zapata Off-Shore Company filed its complaint against Unterweser Reederei, GMBH and the M/S BREMEN in this Court, the case being docketed as 68-21 Civ. T., for damages allegedly sustained by its drill rig CHAPARRAL while in tow of Unterweser's Tug BREMEN. Unterweser responded to the complaint by filing a motion to dismiss for lack of jurisdiction, contending that by virtue of a provision in the towage contract with Zapata the forum for any litigation should be the "London Court of Justice." The motion sought, alternatively, an order declining jurisdiction or an order staying further prosecution of proceedings in 68-21 Civ. T. The Court denied these motions in its Order of July 29, 1968.

After the Zapata complaint was filed in this Court, Unterweser instituted an action against Zapata in the High Court of Justice in London, England, February 21, 1968. In the London suit Unterweser claimed hire and other moneys due under said contract of towage and for damages for breach of contract. Later, on July 2, 1968, Unterweser filed its complaint in this cause, 68-290 Civ T. seeking exoneration from or limitation of liability arising out of the mishap of January 9, 1968. On July 5, 1968, the Court entered an injunction restrain-

ing the prosecution of all other claims and proceedings arising from the events occurring on January 9. 1968.

On July 8, 1968, Zapata filed its claim in this action asserting the same cause of action as alleged in its original complaint in 68-21 Civ. T., and on July 24, 1968, Zapata filed its answer to the complaint.

On August 28, 1968, Unterweser filed its objection to Zapata's claim and also its counterclaim against Zapata, alleging in Count I the same claim as asserted by it in the London suit above mentioned, and in Court II Unterweser alleged a salvage cause of action.

Unterweser continued to pursue its action in the London Court and Zapata sought injunction relief in this Court on September 19, 1968. Unterweser has responded and on October 2, 1968, moved to stay further prosecution of the claim filed by Zapata in this suit. Zapata has not filed answer in the London Court and has not joined issue.

Unterweser states the issue to be decided by the Court thusly:

> "Whether a District Court sitting in Admiralty in a limitation proceeding has jurisdiction under any circumstances, to enjoin the petitioner in the limitation proceeding from prosecution of an action in a foreign country against a claimant in the limitation action?"

Limitation proceedings are considered to be equitable in nature. Cases: *A. C. Dodge, Inc. v. Carras,* 218 F. 2d 911 (2 Cir. 1955); *The Salvore,* 36 F. 2d 712 (2 Cir. 1929); *Hartford Accident & Indemnity Co. v. Southern Pacific Co.* 273 U. S. 207, 1927; *Benedict on Admiralty,* § 479 (6th Ed. 1940).

The Court having once taken jurisdiction in the limitation proceedings may proceed to determine all matters relating to the controversy. As stated in *Hartford Accident Co. v. Southern Pacific Co., supra,* the limitation action is:

> ". . an equitable suit to the extent that the Admiralty Court, having the broadest of powers to do exact

justice between the parties, may take any such action in the case as justice demands . ."

The question of enjoining prosecution of litigation in another forum has been considered in several of the above cases. It seems clear that *one,* when seeking to take advantage of the limitation statutes, § 181 et seq. Title 46, U. S. C. should be required to "do equity" by refraining from litigating the same controversy in other courts. The cases on this issue all regard the determination of whether or not the ship owner may be allowed to proceed simultaneously in the other forum as being based upon equitable considerations. In *the Salvore, supra* and *A. C. Dodge v. Carras, supra,* the Second Circuit Court of Appeals held that the ship owner could not seek limitation of or exoneration from liability in the District Court while at the same time litigating in other courts. A contrary result was reached in Petition of *A/S J. Ludwig Mowinckel Rederi,* 268 F. Supp. 682, (So. Dist. N.Y. 1967). In that case the collision occurred off the coast of France and action was started in England in the High Court of Justice and the court pointed out that many of the claims were being litigated in the London Court. The Court also pointed out that since other suits by cargo claimants against both ship owners were pending in the French Courts, there could not possibly be one jurisdiction in which a concourse of all claims arising out of the collision could be established. The Court acknowledged that it had the power to grant an injunction in such a case but declined doing so stating that the equitable considerations invoked by the moving party were not impressive. This case certainly does not stand for the proposition that the District Court is without power to grant an injunction in such a case, it merely states that the exercise of the power should be based on equitable facets of the particular case. It is clear from *The Salvore, Dodge* and *Mowinckel* cases that the District Court can indeed restrain the petitioner seeking limitation from prosecuting an action based on the same events in another forum.

In seeking the benefits of the Limitation Act, Unterweser should recognize that this Court has jurisdiction, to determine the entire controversy. In aid of this jurisdiction, it may be, and it is, in this case, necessary to require that duplicity of litigation be terminated. This case is unlike cases where there are numerous claimants proceeding in several forums simultaneously In the case at bar there are only two parties litigating the dispute occasioned by the events of January 9, 1968. Suit was initially filed in this Court, this Court has ruled that it does have jurisdiction over the controversy, and this Court also has taken jurisdiction in the limitation action. The proposition that the case should at the same time be prosecuted in another forum is not well received.

Although Unterweser again argues in its Motion to Stay that the venue provisions of the towage contract are controlling, this Court has already passed on that contention. While at that time the Court did not rule that Unterweser could not proceed with an action in the London Court, the same considerations recited as a basis for retaining jurisdiction in the Order of July 29, 1968, are determinative of this issue. In addition, Unterweser has voluntarily invoked this Court's jurisdiction in filing this limitation proceeding in which Zapata has filed claim and answer and joined issue, and also Unterweser has invoked this Court's jurisdiction in filing its counterclaim against Zapata upon which issue has also been joined.

This Court having first acquired jurisdiction over the parties and the subject matter of this controversy both through the complaint in 68-21 Civ. T. and the limitation action filed by Unterweser in this cause, does have the power to restrain the parties before it from litigating the same matters elsewhere. See: 43 C. J. S. Injunctions, § 49; 28 Am. Jur., Injunctions, § 214; and Modern Federal Practice Digest, Courts, § 492, pocket parts pages 266-267.

The balance of convenience is strongly in favor of litigation in this forum initially and to allow the same action to be prosecuted simultaneously elsewhere would cause inequitable hardship. Such an action could only tend to frustrate and delay the speedy and efficient

determination of the cause in this Court. The Court feels that the parties being properly before it should be restrained from proceeding further in the foreign court.

Although Unterweser quite correctly points out that this Court cannot act extraterritorially, the Court does have the power to control the actions of those properly before it. Unterweser, having been brought into the jurisdiction of this Court in 68-21 Civ. T., and having further affirmatively invoked this Court's jurisdiction in the limitation proceeding, is subject to the Court's direction. The Court does not attempt to control the actions of the London High Court of Justice, or any other foreign tribunal for that matter, but it does hereby restrain Unterweser from proceeding further in litigating this action anywhere else until this Court has made its determination.

Having made these determinations and being otherwise advised in the premises, it is, therefore,

ORDERED and ADJUDGED:

1. That the motion for injunction filed by Zapata Off-Shore Company is GRANTED.

2. That the parties in this cause, Unterweser Reederei, GMBH and Zapata Off-Shore Company, are hereby enjoined from proceeding any further in litigating any and all matters relating to this controversy in other jurisdictions (including that certain action now pending in the High Court of Justice, Probate, Divorce and Admiralty Division (Admiralty), London, England, 1968 Folio 64, styled "Unterweser Reederei, GMBH v. Zapata Off-Shore Company") until such time as this Court has made its determination in the case presently before it. A certified copy of this Order may, however, be filed with or otherwise brought to the attention of the High Court of Justice in London.

3. That the motion for stay filed in this cause by Unterweser Reederei, GMBH be and the same is hereby DENIED.

DONE and ORDERED at Tampa, Florida, this 21st day of January, 1969.

Ben Krentzman
BEN KRENTZMAN
UNITED STATES DISTRICT JUDGE

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 27497

In the Matter of the Complaint of
UNTERWESER REEDEREI, GMBH

ZAPATA OFF-SHORE COMPANY,
Plaintiff-Appellee,

versus

M/S BREMEN and UNTERWESER REEDEREI GMBH,
Defendants-Appellants.

Appeal from the United States District Court for the Middle District of Florida

---

(June 19, 1970)

Before WISDOM, GEWIN and AINSWORTH, Circuit Judges.

GEWIN, Circuit Judge: Unterweser Reederei, GMBH (Unterweser), seeks review of an order of the district court denying a stay of the limitation action

Unterweser had filed in that court and enjoining Unterweser from proceeding further with litigation concerning the same subject matter in an English court. The limitation action was brought after Zapata Off-Shore Company (Zapata) filed a complaint in admiralty against Unterweser and its tug Bremen.

Unterweser, a German corporation, contracted with Zapata, a Delaware corporation, with its principal place of business in Houston, Texas, to tow Zapata's drilling barge Chaparral[1] from Venice, Louisiana to Ravenna, Italy. The towage contract contained a forum selection clause providing that any dispute must be litigated before the High Court of Justice in London, England. On 5 January 1968, the Unterweser tug Bremen[2] departed Venice, Louisiana with the Chaparral in tow. During the morning of 9 January 1968, the Chaparral suffered a casualty while proceeding in the Gulf of Mexico. Pursuant to instructions from Zapata, Bremen made for Tampa Bay, the nearest port. Promptly upon arrival, Bremen was arrested by a United States Marshal and her master served with a copy of Zapata's complaint seeking $3,500,000 in damages from Bremen and Unterweser.[3]

Unterweser filed a motion praying in the alternative

---

[1]A self elevating drilling barge, 180 feet in length and 205 feet in breadth, of 4750 gross tons.

[2]A deepsea tug, 178 feet in length, 40 feet in beam, of 1200 gross tons and 7500 horsepower. Bremen was built and registered in Germany and manned by a crew of 23.

[3]Bremen was released from arrest on 26 January 1968, after Unterweser had furnished a letter of undertaking in the amount of $3,500,000.

that the district court (1) dismiss for want of jurisdiction, (2) decline jurisdiction on the basis of forum non conveniens, or (3) stay further prosecution of the action.[4] Unterweser subsequently instituted an action against Zapata in the High Court of Justice in London, claiming moneys due under the towage contract and damages for breach of contract. Zapata was served with the summons of that court; it appeared and moved that the English court dismiss its process. The High Court of Justice denied Zapata's motion holding that it had jurisdiction of the action. This determination was affirmed by the English Court of Appeal which held the forum selection provision of the contract to be reasonable and found no circumstances which would require it to deny enforcement of the agreement.

Before the English Court of Appeal had rendered the above decision, Unterweser filed a complaint in the district court seeking exoneration or limitation of liability arising from the casualty.[5] Consequently the district court entered the usual injunction restraining claimants from proceeding outside the limitation court regarding the events of 9 January 1968. Zapata filed its claim in the limitation proceedings asserting the same cause of action as in its original action. Unterweser filed objection to Zapata's claim and counter-

[4]This motion was denied by the district court on 29 July 1968, after Unterweser had filed its limitation action. Unterweser sought to have this order certified in order to take an immediate appeal pursuant to 28 U.S.C. § 1292(b). The district court refused to certify the order, finding that the question had been mooted by the filing of Unterweser's limitation action and the consequent stay of Zapata's original action.

[5]See 46 U.S.C. § 185 *et seq.*

claimed against Zapata alleging the same claims embodied in its English action plus an additional salvage claim.

Zapata moved for an injunction restraining Unterweser from litigating further in the High Court of Justice. Unterweser moved to stay its own limitation proceeding pending a determination of Unterweser's suit in the English court. The district court denied the requested stay and enjoined Unterweser from proceeding in any other court regarding the same matter prior to a determination of the limitation action.[6] Unterweser appeals from these orders, and we affirm.

I

We shall first comment on the power of the district court to restrain Unterweser from proceeding with its action in England. A court of equity has the traditional power to enjoin parties, properly before it, from litigating in another court. This power has been exercised where the foreign litigation would: (1) frustrate a policy of the forum issuing the injunction; (2) be vexatious or oppressive; (3) threaten the issuing court's in rem or quasi in rem jurisdiction; or (4) where the proceedings prejudice other equitable considerations.[7] We must now determine whether this traditional power of the Chancellor appertains to a district court sitting in a limitation proceeding.

Prior to the decision below there has been scant judicial discussion of the power of an admiralty court to enjoin a party bringing a limitation action from

---

[6] In re Unterweser Reederei, GMBH, 296 F. Supp. 733 (M.D. Fla. 1969).

[7] 7 J. Moore, Federal Practice § 65.19 (2d ed. 1953).

contemporaneous litigation in foreign courts. Our research has added little of significance to the authority cited by the district court. The principal decision on the question was rendered by the Second Circuit in *The Salvore*.[8] In that case, the owners of cargo damaged while on board the Salvore brought a libel in the district court. The Salvore's owner sued the cargo claimants in an Italian court for abuse of process, and subsequently brought a limitation proceeding in the district court. On a motion by the cargo claimants, the district court held that it was without power to stay the limitation proceeding or to compel the shipowner to discontinue its Italian suit. In reversing, the Second Circuit relied on the Supreme Court's description of a limitation proceeding as "the administration of equity in an admiralty court; look[ing] to a complete and just resolution of a many cornered controversy."[9] It stated:

> The limitation proceeding was an appeal to a court of admiralty, which is a court of equity, . . . and the appellee [shipowner], seeking equity, should willingly do equity. . . . It must be willing to bring in all the controversies in the limitation proceedings, for it has invoked the court's aid.[10]

---

[8] 36 F.2d 712 (2d Cir. 1929).

[9] Id. at 713, quoting Hartford Acci. & Indemn. Co. v. Southern P. Co., 273 U.S. 207, 216 (1927).

[10] 36 F.2d at 713. An analogous proposition is embodied in the decision of this court in Beal v. Waltz, 309 F.2d 721 (5th Cir. 1962). There, this court upheld the district court's refusal to modify its injunction to allow the shipowner to plead a favorable state court judgment as res judicata in the limitation pro-

In *A. C. Dodge, Inc. v. J. M. Carras, Inc.*,[11] the Second Circuit relied on its *Salvore* decision in affirming an order of the district court dissolving an injunction entered against claimants in the shipowner's limitation proceeding, and providing that it would be reinstituted only if the shipowner obtained a stay of an action which it was simultaneously pursuing in another federal court. Unterweser seeks to distinguish these cases on the ground that neither involved an injunction of the sort issued in the present case. In *Salvore* and *Dodge*, the courts sought to coerce the shipowner by conditioning the continuance of the injunction, that restrained claimants from litigating outside the limitation court, on voluntary forebearance of the shipowner's foreign action. We find no implication in these cases which would influence us to hold that district courts are impotent to accomplish directly what these courts sought to effect circuitously. To the contrary, the court in *Salvore* expressly stated:

> The court first securing jurisdiction has the authority and power of enjoining the parties to

---

ceedings he had filed in the district court. This court stated:

> There was no equity in the position of appellant. He could not successfully claim the right in the Federal limitation proceeding to restrain claimant in the state court suit, and still obtain the advantage of the litigation there .... 309 F.2d at 724.

[11] 218 F.2d 911 (2d Cir. 1955). This case arose from a collision in the Delaware River. Appellant shipowner filed a limitation petition in the United States District Court for the Eastern District of New York. The owner of the other vessel involved in the collision moved that the court dissolve its prior injunction because appellant was prosecuting a libel against it in Federal District Court in Maryland.

> the litigation from proceeding in another jurisdiction. And the court has an undoubted authority to control all persons and things within its own territorial limits.[12]

Unterweser emphasizes the third case of the trilogy cited in the district court's opinion, *Petition of A/S J. Ludwig Mowinckels Rederi*.[13] There the district court refused to enjoin litigation in an English court by a shipowner participating in a limitation proceeding before the district court. Though there is indication in the opinion that the *Mowinckels* court felt itself limited to the type of order fashioned in *Salvore* and approved in *Dodge*, we agree with the position of the district court below that *Mowinckels* was based on a determination that *any* restraint of the shipowner was improper under the attendant circumstances.

Since the district court entered its orders below, *Mowinckels* has been affirmed by the Second Circuit.[14] The opinion on appeal supports the interpretation given *Mowinckels* by the district court in the instant case. Citing *Salvore* and *Dodge* with approval, the Second Circuit stated:

---

[12] 436 F.2d at 714.

[13] 268 F. Supp. 682 (S.D. N.Y. 1967). The complex litigation involved in this case arose from a collision off the coast of France. Many of the claims were being litigated in England, and cargo claimants were proceeding with actions against both vessels in French courts. As the court below properly observed, the *Mowinckels* case was influenced by the fact that no one court could obtain control of the entire litigation arising from the collision.

[14] Petition of Bloomfield S.S. Co., ____ F.2d ____ (2d Cir.), [Nos. 33681, 33947, 34015, Feb. 26, 1970].

> There can be no question ... that one purpose of the Limitation Act is a concursus or concourse of claimants, and that in an appropriate situation the court may have power to enjoin persons within its jurisdiction with respect to their activities abroad.[15]

The opinion makes it clear that the district court's action was based on the equitable considerations of that case, and implies no general limitation on a district court's equitable powers in a limitation action.

> Concededly, the lower court could have restrained Mowinckels' continuance of its collision action in the English courts. But it declined to do so. We can find no fault in this decision. Under the circumstances of this case the lower court's decision was an appropriate exercise of its discretion.[16]

Unterweser also draws our attention to the proposition, quoted by the district court in *Mowinckels* from *British Transport Commission v. United States*,[17] that:

> "[N]o compulsion could be exerted on foreign claimants to file claims" and ... "an injunction against suits being filed in foreign jurisdictions would be ineffective unless comity required its recognition."[18]

---

15 *Id.*
16 *Id.*
17 354 U.S. 129, 142 (1957).
18 268 F. Supp. at 690. Also see In re Bloomfield S.S. Co., 227 F. Supp. 615 (E.D. La. 1964), *aff'd sub nom.*, Bloomfield S.S. Co. v. Haight, 363 F.2d 872 (5th Cir. 1966), *cert. denied*, 386 U.S. 913 (1967).

This practical observation is not pertinent to the present situation. Unterweser is not merely a potential claimant outside the jurisdiction of the district court; it is a party which has invoked, albeit reluctantly, that very jurisdiction. Though a domestic court has no power to restrain the courts of a foreign nation, it has admitted power to deal with litigants properly before it. An exercise of the latter power is not the assumption of the former.[19] With both Unterweser and substantial amounts of its assets before the district court, it need not resort to comity to enforce its order.

Unterweser also seeks to distinguish the foregoing authorities since none of these cases involved a forum selection clause. We are of the opinion that this clause is only relevant in determining whether the district court properly refused to stay the limitation proceeding, and, on the facts of this case, does not affect the power of the district court to grant injunctive relief. The implications of the forum clause will be considered in the next section of this opinion. For the moment we conclude that Unterweser's petition for limitation subjects it to the full equitable powers of the district court.[20] In a proper case, these include the power to enjoin a petitioning shipowner from litigating in a foreign forum. As this court observed in *Guillot v. Cenac Towing Co.*,[21] "In the Admiralty the Chancellor now goes to sea and has adequate equitable reserves."

---

[19] Steelman v. All Continent Corp., 301 U.S. 278 (1937); 7 J. Moore, *supra* note 4.

[20] Petition of A/S J. Mowinckels Rederi, 268 F. Supp. 682, 689-90 (S.D. N.Y. 1967). *See* British Transp. Comm'n v. United States, 354 U.S. 129 (1957).

[21] 366 F.2d 898, 904 (5th Cir. 1966).

II

Unterweser contends that the district court erred in refusing to stay the limitation action pending a determination of its English suit. It urges that the stay was required by the forum selection clause of the towage contract, which provides: "Any dispute arising must be treated before the London Court of Justice."

At this point it is helpful to pare two questions that are not involved in this appeal. The district court had jurisdiction of the limitation action. We do not understand Unterweser to seriously contend that this jurisdiction was defeated by the presence of the forum clause.[22] Neither are we asked to determine whether Zapata has breached the towage contract by filing the libel in the district court. The question we must decide is whether the district court was obliged to decline to exercise admitted jurisdiction under the facts of the present case.

In *Carbon Black Export, Inc. v. The SS Monrosa*,[23] this court reversed a order of the district court declining jurisdiction of a libel filed by a cargo shipper. The district court, relying on *Wm. H. Muller & Co. v. Swedish American Line, Ltd.*,[24] had upheld a forum

---

[22] See 6A A. Corbin, Contracts § 1445 (1962). Also see note 35 *infra*.

[23] 254 F.2d 297 (5th Cir. 1958), *cert. dismissed*, 359 U.S. 180, *rehearing denied* 359 U.S. 999 (1959).

[24] 224 F.2d 806 (2d Cir. 1955). In a cargo consignee's libel against the carrier, the Second Circuit held that a forum clause contained in the bill of lading should be respected unless shown to be unreasonable. See note 29 *infra*.

selection clause contained in the bills of lading designating Genoa, Italy as the exclusive situs for legal proceedings,[25] finding that the libellant had not shown the clause to be unreasonable. This court held that the forum clause did not apply to *in rem* proceedings. In holding that the district court erroneously declined *in personam* jurisdiction over the shipowner, this court stated:

> In essence, the motion [to decline jurisdiction] was based upon Clause 27 as buttressed by the doctrine of forum non conveniens. Any consideration of such a question starts with the universally accepted rule that agreements in advance of controversy whose object is to oust the jurisdiction of the courts are contrary to public policy and will not be enforced.[26]

This court professed no comment on the Second Circuit's decision in *Muller* distinguishing it on its facts. The Supreme Court granted certiorari to resolve an indicated conflict between *Carbon Black* and *Muller*.[27]

---

[25]The forum clause in *Carbon Black* provided:

> Clause 27 — Also, that no legal proceedings may be brought against the Captain or ship owners or their agents in respect to any loss of or damage to any goods herein specified, except in Genoa, it being understood and agreed that every other Tribunal in the place or places where the goods were shipped or landed is incompetent, notwithstanding that the ship may be legally represented there.

[26]254 F.2d at 300-301. The position of this court in *Carbon Black* reflects what is apparently the majority view regarding forum selection clauses. Annot., 56 A.L.R.2d 300 (1957); 1 E. Benedict, Admiralty § 22a (6th ed. 1940, Supp. 1968).

[27]358 U.S. 809 (1958).

In *SS Monrosa v. Carbon Black Export, Inc.*,[28] the Court dismissed the writ as improvidently granted though it approved this court's interpretation of the forum clause as having no application to *in rem* actions. Any remaining antagonism between the two opinions was relieved when *Muller* was overruled by the Second Circuit sitting en banc in *Indussa Corp. v. SS Ranborg*.[29]

In *Insurance Co. of North America v. N. V. Stoomvaart-Maatschappij*,[30] the district court was requested to decline jurisdiction on the basis of a forum clause which was more broadly drawn than the clause in *Carbon Black* and analogous to the provision in the instant contract.[31] In denying the request the court stated:

> Here the jurisdictional provision involved in Clause 22 refers to "*Any action*," obviously referring to both *in personam* and *in rem* actions. Nevertheless, the Fifth Circuit's holding in Carbon Black is applicable and such an attempt to oust the Court of its jurisdiction in ad-

---

[28] 359 U.S. 180 (1959).

[29] 377 F.2d 200 (2d Cir. 1967). The *Indussa* court held that *Muller* was inconsistent with the Carriage of Goods by Sea Act, 46 U.S.C. §§ 1300-1315. COSGA also applied to the shipment in *Carbon Black*, but we are unable to read that case as applying only to such shipments.

[30] 201 F. Supp. 76 (E.D. La. 1961).

[31] The clause in Insurance Co. of N. Am. provided:

> Clause 22 — Any action with regard to any dispute or claim arising under this bill of lading and the contract evidenced thereby shall be brought before the Court at Amsterdam to the exclusion of any other court unless the Carrier appeals to another jurisdiction or voluntarily submits himself thereto.

> vance will be stricken herewith as being contrary to public policy and unenforceable.[32]

As one commentator has reluctantly observed, the *Carbon Black* decision, "At the very least . . . stands for the proposition that a choice of forum clause will not be enforced unless the selected state would provide a more convenient forum than the state in which suit is brought."[33] We conclude that the forum selection clause, in and of itself, did not compel the district court to stay proceedings in the limitation action so that the parties might litigate in England pursuant to its provisions.

It was within the sound discretion of the district court to decline jurisdiction on the basis of forum non conveniens.[34] But apart from the forum selection clause itself the circumstances supported a retention and determination by the district court.[35] Though the

---

[32] 201 F. Supp. at 78.

[33] Reese, *The Contractual Forum: Situation in the United States*, 13 Am.J.Com.L. 187, 191-192 (1964).

[34] Swift & Co. Packers v. Compania Colombiana Del Caribe, S.A., 339 U.S. 684 (1950). *See* Canada Malting Co. v. Paterson S.S., Ltd., 285 U.S. 413 (1932).

[35] In a footnote to its brief, Unterweser states:

> At oral argument on its Motion, counsel advised the District Court that Unterweser did not intend to press its Motion for Dismissal for Lack of Jurisdiction, nor did it intend to press the *forum non conveniens* argument. It was recognized that the Court did have *in rem* jurisdiction over BREMEN, and it was further recognized that after the fact inconvenience to the parties was not controlling upon the question of enforceability of the contract clause providing for a London forum and English law. Furthermore, upon analysis, there was no strong balance of convenience favoring either the U. S. forum or the London forum, *quite apart from consideration of the Towage Contract*. (Emphasis in original)

towage contract envisioned a long voyage with potential exposure to the jurisdiction of numerous states, the flotilla never escaped the Fifth Circuit's mare nostrum, and the casualty occurred in close proximity to the district court. A considerable number of potential witnesses, including Zapata's crewmen who were aboard the Chaparral, reside in the gulf coast area of the United States. Preparations for the voyage were made in this area, and, after the casualty, inspection of the damage and repair work was conducted there. The testimony of Bremen's crewmen, residing in Germany, is available by way of depositions already taken in the proceedings. The only other nation having significant contacts with, or interest in, the controversy is Germany.[36] England's only relationship is the designation of her courts in the forum clause.

Zapata, the only claimant in the limitation action, is a United States citizen. The discretion of the district court to remand the case to a foreign forum was consequently limited.[37] This is especially true since, as the court noted, there are indications that Zapata's substantive rights will be materially affected if the dispute is litigated in an English court. The towage contract contained the following exculpatory provisions:

---

[36] Unterweser is a German national. The Bremen was built and is registered in Germany and her 23 crewmen are all German nationals. The towage contract was executed by Unterweser in Bremen, Germany.

[37] Swift & Co. Packers v. Compania Colombiana Del Caribe, S.A., 339 U.S. 684 (1950); Burt v. Isthmus Dev. Co., 218 F.2d 353 (5th Cir.), *cert denied*, 349 U.S. 913 (1955). Annot., 90 A.L.R.2d 1109 § 9 at 1125 (1963).

> 1. ... Urag [Unterweser], their masters and crews, are not responsible for defaults and/or errors in the navigation of the tow.
>
> 2.(b) Damages suffered by the towed object [Chaparral] are in any case for account of its owners.

These provisions are apparently contrary to public policy and unenforceable in American courts.[38] However, according to the affidavit of F. D. Bateson, Zapata's English maritime law expert, these clauses would be held prima facie valid and enforceable by an English court.[39] The district court was entitled to consider that remanding Zapata to a foreign forum, with no practical contact with the controversy, could raise a bar to recovery by a United States citizen which its own convenient courts would not countenance.

Moreover, it is doubtful that Unterweser would benefit even if we ignored *Carbon Black* and somehow resurrected the *Muller* rule. The minority of jurisdictions which recognize forum selection provisions, as prima facie valid, deny enforcement where the clause

---

[38] Dixilyn Drilling Corp. v. Crescent Towing & Salvage Co., 372 U.S. 697 (1963); Bisso v. Inland Waterways Corp., 349 U.S. 85 (1955).

[39] The affidavit stated in part:

> It is my opinion that the above quoted exculpatory clauses, under English law, are not against the public policy of England, and would be held to be prima facie valid and enforceable by an English Court should a cause of action be filed in England either by way or original action or by way of counterclaim. ...

Unterweser does not take issue with Mr. Bateson's interpretation of English law.

is shown to be unreasonable.[40] One commentator, advocating this position, elaborated on the question of reasonableness:

> [E]ffect should be denied the clause if there is reason to believe that the courts of the selected state would deal unfairly with the plaintiff or would deny him relief to which he as entitled, ...
>
> Likewise, effect should be denied the clause if the selected state is a seriously inconvenient one for the trial of the action, as might be true in a situation where the occurrence sued upon took place in a distant place from which, if the trial were to be held in the selected state, it would be necessary to transport large numbers of witnesses.[41]

On the facts of the present case the district court did not choose to disturb the original choice of forum.[42] We do not feel it abused its discretion in this regard.

III

Having declined to stay the limitation action, we feel it was proper for the district court to restrain

---

[40]Central Contracting Co. v. Maryland Cas. Co., 367 F.2d 341 (3d Cir. 1966); General Motors Overseas Operation Div. v. S.S. Goettingen, 225 F. Supp. 902 (S.D. N.Y. 1964); Chemical Carriers, Inc. v. L.Smit & Co.'s Internationale Sleepdienst, 154 F. Supp. 886 (S.D. N.Y. 1957).

[41]Reese, *supra* note 33 at 189.

[42]Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947).

Unterweser from proceeding in any other court. The Supreme Court, regarding limitation proceedings, has stated:

> [T]his court has by its rules and decisions given the statute a very broad and equitable construction for the purpose of carrying out its purpose, and for facilitating a settlement of the whole controversy over such losses as are comprehended within it, and that all the ease with which right can be adjusted in equity is intended to be given to the proceeding.[43]

Unlike the situation faced by the district court in *Petition of A/S J. Ludwig Mowinckels*,[44] the instant case involves only two contestants, both of whom are properly before a court of competent jurisdiction. It was within the court's discretion to determine, as it did, that allowing simultaneous prosecution of the same action in a foreign forum thousands of miles away would result in "inequitable hardship" and "tend to frustrate and delay the speedy and efficient determination of the cause."[45] On the facts of the present case, we find no abuse of that discretion.

In accordance with the foregoing, the order of the district court is AFFIRMED.

---

[43]Hartford Accident & Indem. Co. v. Southern P. Co., 273 U.S. 207, 215 (1927).

[44]268 F. Supp. 682 (S.D.N.Y. 1967), see note 13 *supra*.

[45]*See* Petition of Bloomfield S.S. Co., —— F.2d ——, (2d Cir.), [Nos. 33681, 33947, 34015, Feb. 26, 1970].

WISDOM, Circuit Judge, dissenting.

"Problems arising in a court call for a perceptive awareness not only of what courts are for but of what a legislature is for and sometimes also of what an administrative agency is for *and of what matters can best be left to private decision.*" H. Hart & A. Sacks, The Legal Process iii (tent. ed. 1958) (emphasis supplied).

In this case we deal with an agreement made between two responsible corporations involved in an international transaction. This transaction was no run-of-the-mine project. The subject of the contract was the towing of a six million dollar self-elevating oil drilling barge from the Mississippi to the Adriatic. Unterweser, the tower, is a corporation organized and domiciled in Germany. Zapata, owner of the rig, is a Delaware corporation domiciled in Texas. Zapata solicited bids from several towing companies before engaging Unterweser. Zapata then requested Unterweser to furnish a written contract for its perusal. Unterweser, which generally inserts a provision for German jurisdiction and application of German law, specified an English forum and English law as a reasonable compromise with an American firm in a transaction requiring an oil rig to traverse the Gulf of Mexico, the Atlantic, the Mediterranean, and the Adriatic. After reviewing the suggested contract, Zapata made several changes in the document before executing it. Presumably Zapata could have rejected the contract outright and accepted one of the other bids. Yet the Court holds that these corporations of diverse nationalities, performing

a contract in the vicinity of many jurisdictions, could not effectively agree on which forum they would use to regulate their relationship and settle their disputes (probably the best method of ensuring a correct application of the governing law. Reese, The Contractual Forum: Situation in the United States, 13 Am. J. Comp. L. 187, 189 (1964)). Inevitably such a holding poses a serious disability to certainty in the ever-growing international trade. Where contract relations permit advance planning in transnational contracts, "there are evident advantages in such certainty, in avoiding later jurisdictional disputes. Transnational commercial activities would thereby be facilitated". H. Steiner & D. Vagts, Transnational Legal Problems 727 (1968).[1]

If *Carbon Black Export, Inc. v. The SS Monrosa*, 5 Cir. 1958, 254 F.2d 297, *cert. dismissed*, 1959, 359 U.S. 180, requires the result the Court reaches here, then I believe that case is outmoded. The *Carbon Black* Court[2] believed "the universally accepted rule" to be

---

[1] *See* Nadelmann, The Hague Conference on Private International Law & the Validity of Forum Selecting Clauses, 13 Am. J. Comp. L. 157 (1964); Lenhoff, The Parties' Choice of a Forum: "Prorogation Agreements", 15 Rutgers L. Rev. 414 (1961).

[2] In *Carbon Black*, an American exporter sued both the vessel and the vessel's owner, an Italian corporation, for damage to and nondelivery of a cargo of carbon black placed on board the S.S. Monrosa in the United States for shipment to Italy. The defendant moved for dismissal because of a provision in the contract that any action for loss or damage to the goods should be brought in Genoa, This Court reversed the district court's decision to grant the motion, holding that the in rem action did not come within the language of the forum clause. With respect to the action in personam we stated that "the universally accepted rule [is] that agreements in advance of controversy . . . to oust the jurisdiction of the courts are contrary to public policy and will not be enforced". The Supreme Court at first granted certiorari to resolve an apparent

that forum agreements are unenforceable. I cannot tell whether the majority here reads *Carbon Black* at its broadest, that forum agreements are necessarily "contrary to public policy and will not be enforced", 254 F.2d at 301, or at its narrowest, "that a choice of forum clause will not be enforced *unless the selected state would provide a more convenient forum than the state in which suit is brought*". Reese at 192 (emphasis supplied).[3] Believing as I do that *Carbon Black's*

---

conflict with Wm. H. Muller & Co. v. Swedish American Line, Ltd., 2 Cir. 1955, 224 F.2d 806, *cert. denied*, 1955, 350 U.S. 903, then dismissed certiorari as improvidently granted, finding that the clause in *Carbon Black* did not include an in rem action and refusing to rule on the clause's validity with regard to the in personam action. 359 U.S. 180. *Muller* had said that courts should enforce a forum clause unless it was unreasonable or prohibited by statute.

[3] Perhaps the original *Carbon Black* opinion is largely responsible for that ambiguity. After presenting its universal rule, *Carbon Black* stated that it neither espoused nor rejected the Second Circuit's position in *Muller*. *Carbon Black* referred to factual distinctions from Muller which tended to show that the operation of the *Carbon Black* forum clause was less reasonable than *Muller's*, then concluded that the doctrine of forum non conveniens did not justify declining jurisdiction because the balance was not strongly in favor of the defendant. Thus, it is unclear whether the factual distinctions buttress the conclusion that forum non conveniens did not apply, or whether *Carbon Black* was somehow retreating from the universality of its principle. I believe the same ambiguity is reflected in Insurance Company of North America v. N.V. Stoomvaart-Maatschappij "Oostzee", E.D. La. 1961, 201 F. Supp. 76. There the district court concluded that *Carbon Black* required forum clauses to "be stricken herewith as being contrary to public policy and unenforceable", 201 F. Supp. at 78, but proceeded to analyze the reasonableness of the particular clause in the circumstances presented.

There are other indications that this Court has not taken such a harsh view of forum clauses as *Carbon Black* proposes. In Anastasiadis v. S.S. Little John, 5 Cir. 1965, 346 F.2d 281, *cert. denied*, 1966, 384 U.S. 920, for example, we affirmed the

rule is erroneous both historically and analytically, however, I must reject both the broad and the narrow formulations as unsatisfactory.[4]

---

district court's decision to decline jurisdiction of an in rem suit. There, a Greek seaman had contracted in Greece for employment on a vessel of Liberian registry. Although a Liberian corporation owned the vessel, that corporation was in turn wholly owned and controlled by an American corporation, in turn wholly owned and controlled by a United States citizen. The contract, written in Greek, provided that the seaman would join the vessel at Houston, Texas. But it stated that Greek law would govern disputes and designated the Greek courts at Piraeus as the forum. When the seaman joined the ship at Houston, he found conditions unsatisfactory and sued in a Texas district court for breach of contract and tort. Depositions of witnesses weer taken in the United States. This Court concluded that even though the district court undoubtedly had jurisdiction, it also had discretion to decline jurisdiction of a controversy between foreigners. Although a nominal foreign registry is often pierced where American laws are to be enforced against a ship beneficially owned by Americans, the Court declined to do so. It said:

> The contract in the instant case provided not only that Greek law would be determinative but also that the Greek courts were to be the proper forum for the litigation of claims arising out of the contract. We see no reason, in the circumstances of this case, why this provision should not be given effect in the absence of any suggestion in the record that Greece is an inconvenient forum or that Greek law provides an inadequate remedy.

346 F.2d at 284. It is perhaps this less rigorous view of forum clauses and *Oostzee's* analysis of the unreasonable aspects of the forum clause there that have prompted the observation by some commentators that cases striking down forum clauses in the Fifth Circuit emphasize the "unreasonable character" of the particular clause. *See, e.g.*, Steiner v. Vagts at 734.

[4] Perhaps *Carbon Black* could be distinguished or limited to its facts. The Carriage of Goods by Sea Act, 46 U.S.C. §§ 1300-15, applied there, and the Second Circuit has recently found that § 3(8) of that Act makes forum clauses unenforceable where it applies. Indussa Corp. v. S.S. Ranborg, 2 Cir. 1967, 377 F.2d 200; *accord*, G. Gilmore & C. Black, The Law of Admiralty

I think the rule should be "outright recognition of the parties' autonomy :.. if tempered by the court's continuing power to refuse effect to 'unreasonable' prorogation [choice of forum] agreements, and subject to specific legislation limiting access to the courts of the forum". A. Ehrenzweig, Conflict of Laws § 41, at 153 (1962). Or, as the Restatement puts it, "[t]he parties' agreement as to the place of the action cannot oust a state of judicial jurisdiction, but such an agreement will be given effect unless it is unfair or unreasonable". Restatement (Second) of Conflict of Laws § 80 (Proposed Off. Draft, 1967).[5]

---

§ 3-25, at 125 n. 23 (1957); 40 U. Col. L. Rev. 159 (1967); 8 Va. J. Int. L. 161 (1967); Note, Enforcement & Effect of the Jurisdiction Clause in Admiralty, 34 St. John's L. Rev. 72, 76-79 (1959). *But see* 9 Harv. Int. L. J. 333, 339-40 (1968); 14 Wayne L. Rev. 609, 614-16 (1968); 45 Corn. L. Q. 364, 372 (1960). *Carbon Black*, moreover, specifically stated that it neither espoused nor rejected *Muller*, a case that enforced a forum clause where there was no evidence of undue bargaining pressure and the clause was not unreasonable. Finally, *Carbon Black* dealt with the specification of an Italian forum for a contract printed in English adopting American law (COGSA) and executed in the United States. But I tend to agree with the majority that *Carbon Black*'s language and reasoning, even at their narrowest, are broad enough to cover this case, and I feel that it must be overruled.

[5] The Restatement of Contracts § 558 (1932) is sometimes read the same way, *see* Krenger v. Pennsylvania R.R., 2 Cir. 1949, 174 F.2d 556, 561 (L. Hand, J., concurring), presumably because the Restatement specifies that agreements to litigate in federal rather than state court or vice versa are illegal, but outlaws other agreements limiting the tribunal only if they do so "unreasonably".

The presumption quoted in text from the Restatement of Conflicts has changed since an earlier draft. In 1957 the comparable section read:

> The parties' agreement as to the place of suit cannot prevent the exercise of judicial jurisdiction by a State. A provision to this effect will, however, be given effect

I.

The courts' distaste for forum clauses has usually been linked to a supposed longstanding judicial antipathy to arbitration agreements. Ehrenzweig § 41, at 148. Most judges and commentators have attributed this attitude to "the contests of the different Courts in ancient times for extent of jurisdiction, all of them being opposed to anything that would altogether deprive every one of them of jurisdiction". *Scott v. Avery*, 5 H. L. Cas. 811, 853, 40 Rev. R. 392, 413 (1856) (Lord Campbell). But more recently scholars have demonstrated that the supposed antagonism to arbitration

---

by a court if it is deemed fair and reasonable.
Restatement (Second) of Conflict of Laws § 117a (Tent. Draft No. 4, 1957).

The Comment to the present § 80 is a useful synopsis of my position in this dissent. As the rationale for § 80, it states:

> Private individuals have no power to alter the rules of judicial jurisdiction. They may not by their contract oust a state of any jurisdiction it would otherwise possess. This does not mean that no weight should be accorded a provision in a contract that any action thereon shall be brought only in a particular state. Such a provision represents an attempt by the parties to insure that the action will be brought in a forum that is convenient for them. A court will naturally be reluctant to entertain an action if it considers itself an inappropriate forum. And the fact that the action is brought in a state other than that designated in the contract affords ground for holding that the forum is an inappropriate one and that the court in its discretion should refuse to entertain this action. Such a provision, however, will be disregarded if it is the result of overreaching or of the unfair use of unequal bargaining power or if the forum chosen by the parties would be a seriously inconvenient one for the trial of the particular action. On the other hand, the provision will be given effect, and the action dismissed, if to do so would be fair and reasonable.

agreements was not so entrenched and that its apparent cause, the desire for fees, was erroneously ascribed. 6A A. Corbin, Contracts § 1433, at 391-95 (1962); Ehrenzweig § 42, at 153 & n. 26; Sayre, Development of Commercial Arbitration Law, 37 Yale L. J. 595 (1928).[6] Instead, until the Statute of Fines and Penalties, 8 & 9 Wm. III (1687), made the remedy impractical, courts consistently enforced arbitration agreements through the vehicle of penal bonds. With this remedy gone, pressure mounted to make arbitration agreements irrevocable. The courts resisted not on account of the fees involved, but because "arbitration proceedings were not regulated and the parties' only effective protection against an unfair or insufficient hearing by the arbitrators was in revoking the submission before the award was given". Sayre at 605.[7] Not until the nineteenth century was the revocability of arbitration agreements simply premised on the courts' opposition to "ouster" from their jurisdiction. Ehrenzweig § 42, at 155.[8] And then legislative action both in England and in the United States encouraged the courts to take a more benevolent view of such agreements.[9]

---

[6] If ever there had been any substance to the fees argument, it should have no force in our Circuit where we are faced with crowded and constantly growing dockets (especially since we are not paid by the case).

[7] *Cf.* 6A Corbin, § 1433, at 391-95. Forum clauses are sometimes referred to as preferable in this respect, because a judicial remedy is still available. Ehrenzweig, § 42, at 152.

[8] Sayre at 604 identifies an eighteenth century case, Kill v. Hollister, 1 Wils. 129 (1746) as the first case actually to speak in these terms, but the majority of cases were later.

[9] Common Law Procedure Act of 1954, 17 & 18 Vict., c. 125, § 11 (permitting use of the courts' discretion); Arbitration Act of 1889, 52 & 53 Vict. c. 49; Georgia Arbitration Act, Ga. Laws

The strength of this misconception, however, seems to have contributed to American courts' generally negative attitude toward forum clauses. *Home Insurance Company v. Morse*, 1874, 20 Wall. (87 U.S.) 445, 22 L.Ed. 365, 368, concluded that the authorities showed agreements in advance to oust the courts of jurisdiction conferred by law [to be] illegal and void". The Court quoted at length from *Scott v. Avery* and from Mr. Justice Story's Commentaries on Equity Jurisprudence (§ 670) that

> where the stipulation, though not against the policy of the law, yet is an effort to devest the ordinary jurisdiction of the common tribunals of justice, such as an agreement in case of dispute to refer the same to arbitration, a court of equity will not any more than a court of law interfere to enforce the agreement . . . .[10]

1855-56, 222-24. Action in the United States did not become significant until after Judge Hough's sardonic opinion in United States Asphalt Ref'g Co. v. Trinidad Lake Petroleum Co., S.D.N.Y. 1915, 222 Fed. 1006. *See* Sayre at 612. But that opinion prompted enactment of arbitration statutes, *See e.g.*, Gilbert v. Burnstine, 1931, 255 N.Y. 348, 174 N.E. 706, 707: "Settlements of disputes by arbitration are no longer deemed contrary to our public policy. Indeed, our statute encourages them."

[10] The heart of *Morse* was the constitutional issue of the line between state and federal jurisdiction. A Wisconsin statute required that before doing business in the state, all foreign corporations must sign agreements not to remove a suit from state to federal court. The Home Insurance Company filed the agreement, but when sued, attempted to remove the case to federal court. The Wisconsin courts refused to allow removal. The United States Supreme Court reversed on the ground that a state had no constitutional power to compel a surrender

In truth, however, courts had not uniformly disfavored forum clauses. Decisions enforcing the parties' designation of a forum date back to 1796. *Gienar v. Meyer*, 126 Eng. Rep. 728 (C.P. 1796) (Dutch seaman suing Dutch seamaster for wages in English court; *held*, ship's articles specifying the code of Rotterdam and the courts of Holland were enforceable). They continue through the nineteenth century despite the fear of "ouster". Indeed, the example of arbitration influenced the English courts to deal kindly with forum clauses: *Law v. Garrett*, 8 Ch. D. 26 (C.A. 1878), for example, spoke in terms of arbitration in a case involving the stipulation of a Russian court in St. Petersburg. Lord Justice Baggallay observed that the court entirely agreed with *Willesford v. Watson*, L.R. 8 Ch. 473 (1870), that where "parties choose to determine for themselves that they will have a forum of their own selection instead of resorting to the ordinary Courts, a *prima facie* duty is cast upon the Courts to act upon such arrangement". 8 Ch. D. 26, 37. The agreement did not "oust" the court of jurisdiction, but did give it discretion to stay the proceedings. The English courts have continued to follow the principle of *Law v. Gar-*

---

of the right of removal to federal court. The observation that even without the statute such an agreement was void appears to be surplusage. The more compelling argument against enforcing the clause was the fact that an unconstitutional condition was being imposed. Since the alternative was prohibition against doing business in Wisconsin, the contract could also be characterized as one of adhesion. We do not face the *Morse* constitutional argument in this case.

rett.[11] Today their rule appears to be enforcement of a forum clause unless the particular case militates against it. The Vestris, 43 Lloyd's List L.R. 86 (Adm. Div. 1932). "[A] forum selection agreement will, *prima facie*, be respected; the burden of proof lies upon the party resisting the application for a stay, and he must convince the court that a stay should be granted." Cowen & Mendes da Costa, The Contractual Forum: Situation in England & the British Commonwealth, 13 Am. J. Comp. L. 179, 186 (1964).

American courts, however, have generally retained their hostility to forum agreements. If the law is to be applied simply by tallying up the number of precedents that have not been overruled, then the majority opinion here is undoubtedly correct.[12] But important incursions have been made. In 1949, Judge Learned Hand observed:

---

[11] *See, e.g.*, Austrian Lloyd Steamship Co. v. Gresham Life Ass. Soc'y [1903] 1 K.B. 249 (C.A.,); Kirchner & Co. v. Gruban, [1909] 1 Ch. 413 (1908); The Media, 41 Lloyd's List L.R. 80 (Adm. Div. 1931).

For a discussion of the law on forum clauses in the British Commonwealth see Cowen and Mendes do Costa, The Contractual Forum: A Comparative Study, 43 Can. Bar Rev. 453 (1965). For other countries, *see generally* The Validity of Forum Selecting Clauses: Proceedings of the 1964 Annual Meeting of the American Foreign Law Association, 13 Am. J. Comp. L. 157 (1964); Lenhoff, The Parties' Choice of a Forum: "Prorogation Agreements", 15 Rutgers L. Rev. 414 (1961).

[12] Many of the cases are cited at Annot., 56 A.L.R.2d 300 (1957) (and Later Case Service, 1967). In 1950 it was said of the few cases that enforced a forum clause, "they stand alone, separate and apart, branded with the malodorous antipathy of a bastard child at a family reunion of bluebloods". Comment, Agreements in Advance Conferring Exclusive Jurisdiction on Foreign Courts, 10 La. L. Rev. 293, 297 (1950).

> In truth, I do not believe that, today at least, there is an absolute taboo against such contracts at all; in the words of the Restatement [of Contracts § 558], they are inavlid only when unreasonable .... What remains of the doctrine is apparently no more than a general hostility, which can be overcome, but which nevertheless does persist.

Krenger v. Pennsylvania Railroad, 2 Cir. 1949, 174 F.2d 556, 561 (concurring opinion). In 1951, the Second Circuit enforced a forum clause specifying Norwegian courts. *Cerro de Pasco Copper Corporation v. Knut Knutsen*, 2 Cir. 1951, 187 F.2d 990.[13] And in 1955 it went one step farther in destroying the hostility, holding in *Wm. H. Muller & Company v. Swedish American Lines Ltd.*, 2 Cir. 1955, 224 F.2d 806, *cert. denied*, 1955, 350 U.S. 903, that courts should enforce a forum clause in an international contract unless it was unreasonable or prohibited by statute.[14] I must disagree with the ma-

---

[13]Although Cerro de Pasco was a New York corporation, the district court found that it was "like an assignee" of a Belgian corporation and that the controversy was therefore really between aliens. S.D.N.Y. 1950, 94 F. Supp. 60, 61. The Second Circuit, however, did not refer to this argument. It dealt specifically with the issue whether an American court could decline jurisdiction of an American plaintiff and held that the forum clause made Swift & Co. Packers v. Compania Colombiana, 1950, 339 U.S. 684, S.Ct. , 95 L.Ed. 1206 (*see* discussion in section III, *infra*), inapposite.

[14]In *Muller* a New York corporation sued in a New York federal court to recover the value of a cargo of cocoa beans lost in transit between Sweden and Philadelphia. The district court dismissed the suit because a clause in the bill of lading provided that any claims against the vessel's owner, a Swedish corporation, should be decided according to Swedish law and in the Swedish courts. The Second Circuit affirmed, holding

jority's conclusion that *Indussa Corporation v. S.S. Ranborg*, 2 Cir. 1967, 377 F.2d 200,[15] overrules this part of *Muller*. *Indussa's* decision not to enforce a forum clause derived from its view that the Carriage of Goods by Sea Act, 46 U.S.C. §§ 1300-15, where applicable, prohibited such clauses. COGSA did apply to *Muller* (as it did to *Carbon Black*) and for that reason *Muller* was overruled. "[T]he *Muller* court leaned too heavily on general principles of contract law and gave insufficient effect to the enactments of Congress governing bills of lading . . ." 377 F.2d at 202. Where COGSA does not apply as in this case, I believe Muller's "general principles of contract law" still lead to *Muller*'s result.[16]

---

first that the forum clause was not contrary to COGSA because its application would not result in a "lessening" of the "liability" imposed upon the defendant by the Act; second, that a forum clause should be enforced unless unreasonable or contrary to statute. The clause in question was not unreasonable because "most of the evidence as to unseaworthiness will be more readily available in a Swedish court"; all members of the crew resided in Sweden and the vessel had been built in that country; and, "for aught that appears", the parties' consent to inclusion of the clause in the bill of lading was "freely given".

[15] In *Indussa* a New York corporation sued the vessel because a cargo of nails and barbed wire arrived in San Francisco, from Antwerp, Belgium, rusted and depreciated in value. The district court dismissed the suit on the basis of a clause specifying the carrier's principal place of business (Norway) as the forum.

[16] Judge Friendly's remarks about the consequences of sending an American to a foreign forum must be read in the context of his concern accurately to comply with a statute prohibiting contract terms that lessen liability. If they go beyond that, I must agree with Judge Moore's special concurrence that it is "singularly inappropriate for our courts to say, in effect, that the courts of all other nations are so unable to dispense justice that as a matter of public policy, we must protect our citizens by outlawing any other tribunal than our own". 377

In 1965, the Pennsylvania Supreme Court enforced a forum clause between two American parties specifying New York courts. The Pennsylvania court started with the proposition that private bargaining could not change statutory rules of jurisdiction or venue.

> However, we do not agree with these cases to the extent that they hold that an agreement between the parties, purporting to determine the forum where future disputes between them should be litigated, is *per se* invalid and without legal effect. The modern and correct rule is that, while private parties may not by contract prevent a court from asserting its jurisdiction or change the rules of venue, nevertheless, a court in which venue is proper and which has jurisdiction should decline to proceed with the cause when the parties have freely agreed that litigation shall be conducted in another forum and where such agreement is not unreasonable at the time of litigation.

F.2d at 205. That they do not I am convinced by Judge Friendly's rejoinder: "we do not 'outlaw any other tribunal than our own' as our brother Moore suggests; we hold merely that Congress outlawed clauses prohibiting American courts from deciding causes otherwise properly before them". *Id.* at 204. I observe, however, that the concern that expenses in going to a foreign court may outweigh an American's modest claim tends to ignore the other side of the coin: that a foreign national's expenses in coming to the United States may outweigh the value of asserting a legitimate defense to the modest claim. It will not do to say in these cases that part of the contract has American ties, for part of the contract has foreign ties. Properly designed forum clauses can deal with such circumstances and arrive at a fair compromise.

Central Contracting Company v. C. E. Youngdahl & Company, 1965, 418 Pa. 122, 209 A.2d 810, 816.

The Third Circuit, confronted with the same forum clause the next year, concluded that

> both federal and state courts have increasingly in recent years recognized the same principle which the Supreme Court of Pennsylvania has now adopted. It is becoming more widely recognized that for reasons of business or convenience the parties may have bargained that all litigation arising out of their complex activity under a contract shall be drawn into one jurisdiction. So long as there is nothing unreasonable in such a provision there is no basis for viewing it as an affront to the judicial power, which must be stricken down. On the contrary, it should be respected as the responsible expression of the intention of the parties so long as there is no proof that its provisions will put one of the parties to an unreasonable disadvantage and thereby subvert the interests of justice.

Central Contracting Company v. Maryland Casualty Company, 3 Cir. 1966, 367 F.2d 341, 344-45.[17]

---

[17]The Supreme Court may have expressed approval of forum clauses in an interstate context in National Equipment Rental v. Szukhent, 1964, 375 U.S. 311, 315-16, 84 S.Ct. 411, 11 L.Ed. 2d 354, 357-58. In dealing with a contract clause designating an agent for service of process, the Court said:

> The purpose underlying the contractual provision here at issue seems clear. The clause was inserted by the petitioner and agreed to by the respondents in order to assure that any litigation under the lease should be conducted in the State of New York. . . .

This very cursory review indicates that an unqualified judicial opposition to forum and arbitration clauses has at best only weak historical antecedents. Neither arbitration nor forum clauses were the subject of such opprobrium as has popularly been supposed. Concern there was, but not a universal rule that such clauses were void. And despite American courts' general disregard of forum clauses, significant dissenting views have been registered.[18]

II.

A search for policies to buttress the wholesale invalidation of forum clauses is likewise unsuccessful,

---

> And it is settled ... that parties to a contract may agree in advance to submit to the jurisdiction of a given court....

Szukhent is not significant authority, however, because the Court there was faced with the question whether New York courts had jurisdiction, not whether other courts should decline jurisdiction. Justice Black, dissenting, reads *Szukhent* more broadly: "Here this contract as effectively ousts the Michigan courts of jurisdiction as if it had said so. Today's holding disregards Michigan's interest in supervising the protection of rights of its citizens who never leave the State but are sued by foreign companies with which they have done business". 375 U.S. at 327, 11 L.Ed. 2d at 364-65.

[18] Earlier cases foreshadowed these results. Gilbert v. Burnstine, 1931, 255 N.Y. 348, 174 N.E. 706, hold that a New York citizen's agreement to arbitrate in England should be enforced. The New York court concluded that these agreements were not contrary to public policy, and "[c]ontracts made by mature men who are not wards of the court should, in the absence of potent objection, be enforced. 174 N.E. at 707. Mittenthal v. Mascagni, 1903, 183 Mass. 19, 66 N.E. 425, enforced a forum clause designating Italian courts. Although the plaintiffs were New York citizens, the contract conferred Italian domicile upon them. Therefore, the court spoke of the contract as "between citizens of foreign states" and found no public policy to prevent enforcing it. For a collection of recent cases enforcing forum clauses see Annot., *supra* note 12.

Chief Justice Shaw of Massachusetts tried to formulate the arguments in 1856, recognizing then that history afforded "no authority upon which to determine the case". *Nute v. Hamilton Mutual Insurance Company*, 72 Mass. (6 Gray) 174, 185 (1856). He reasoned first that

> [t]he rules to determine in what courts and counties actions may be brought are fixed, upon considerations of general convenience and expediency, by general law; to allow them to be changed by the agreement of parties would disturb the symmetry of the law, and interfere with such convenience.

Id. at 184. This symmetry and convenience argument bears doubtful relevance to the intrastate venue problems involved in Nute.[19] On the international scene, it is simply inapplicable. Reese at 188. No general law fixes venue among the nations and states, only individual jurisdictional rules and happenstance. Convenience and expedience can more successfully be served by duly considered forum agreements fairly bargained for and enforceable.

> Shaw's second concern was that forum contracts might be induced by considerations tending to bring the administration of justice into disrepute; such as the greater or less in-

---

[19] See Daley v. People's Bldg., Loan & Sav. Ass'n., 1901, 178 Mass. 13, 59 N.E. 452 (Holmes, C.J.: *Nute* obviously was "a somewhat hesitating decision", not to be extended; *held*, contractual stipulation of New York forum was enforceable).

> telligence and impartiality of judges, the greater or less integrity and capacity of juries, the influence, more or less, arising from the personal, social or political standing of parties in one or another county.

Id. at 184. To the extent this argument is a real concern, it appears less pertinent to an international context than to intrastate venue problems where parties might more easily exert influence on local adjudicators. If it is a problem, however, wholesale prohibition of forum clauses is an excessive response. An inquiry that takes this factor into account where it arises would adequately meet that concern. The best comment about Shaw's policy arguments is his own: "these considerations are not of much weight" and "no great reliance" deserves to be placed upon them. *Id.* at 184.

The greatest inconvenience to the Massachusetts Chief Justice's mind was

> requiring courts and juries to apply different rules of law to different cases, in the conduct of suits, in matters relating merely to the remedy, according to the stipulation of parties in framing and diversifying their contracts in regard to remedies.

Id. Of course consistent enforcement of a forum stipulation need not produce confusion. Shaw's real objection was rooted in his belief that the parties to a contract could not make terms with regard to their remedy; that was a matter only the courts could decide. Id. at 180-81. Although the distinction between substantive rights and remedies may well exist, the breadth of the principle as Shaw saw it has been subjected to serious challenge, Ehrenzweig § 41, at 149,[20] and in the case of arbitration statutes, overruled.

> [G]enerally, all stipulations made by parties for the government of their conduct, or the control of their rights, in the trial of a cause, or the conduct of a litigation, are enforced by the courts.
>
> . . . [I]t is not true that parties cannot enter into stipulations which in some sense will bind and control the action of the courts. They do not literally control the power of the courts except as such power is in all cases circumscribed by the necessity which obliges every court to apply the proper rules of law to the facts of every case, and to exercise its powers according to established principles.

In re New York, Lackawanna & Western Railroad Company, 1885, 98 N.Y. 449, 453, 62 N.Y.S. 522, 523-24. It may be that some questions of remedy are less amenable to private settlement than are questions of primary rights and obligations. But the specific question

---

[20] *See* 6A Corbin § 1432, at 386 n. 76 & § 1434, at 397.

still unanswered is whether forum clauses are thus an inappropriate subject for private ordering.

This Court was no more successful in marshalling arguments to support its conclusion in *Carbon Black*. We simply relied on authority as characterized by Corpus Juris Secundum and American Jurisprudence to opine that forum agreeements are "contrary to public policy". That of course "is the conclusion to be proved rather than proof for the conclusion". Ehrenzweig, § 41, at 149. Our apparent concern that such agreements attempted to "oust" us of jurisdiction was ill-considered. The majority here correctly points out that jurisdiction is not an issue. The question is whether a court possessing jurisdiction should for good and sufficient reasons decline to exercise it. But since the bogey of jurisdictional ouster infuses so much of the opposition to forum clauses and since it infuses the *Carbon Black* rule to which the Court pays obeisance today, it is necessary to lay it to rest. There are various ways to do so. For example, "[i]f the agreement is enforced, it cannot truly be said that jurisdiction has been conferred or ousted by the parties. Jurisdiction is exercised or withheld only by force of the law that gives effect to the parties' agreement". Perillo, Selection Forum Agreements in Western Europe, 13 Am. J. Comp. L. 162 (1964); *accord, In re New York, Lackawanna & Western Railroad Company*, 1885, 98 N.Y. 449, 453, 62 N.Y.S. 533, 534. If that formulation does not persuade the fearful we can follow the example of the Netherlands. There "the courts recognize that the parties have no power to modify the rules of juris-

diction. Nevertheless, the courts refuse to participate in a breach of contract. Consequently, they refuse to take cognizance of a case in violation of the parties' agreement". Perillo at 165; *accord, Racecourse Betting Control Board v. Secretary for Air,* [1944] 1 Ch. 114, 126 (C.A. 1943).

In summarizing the English view, Lord Denning couches it in these terms:

> I do say that the English courts are in charge of their own proceedings: and one of the rules they apply is that a stipulation that all disputes should be judged by the tribunals of a particular country is not absolutely binding. It is a matter to which they will normally give effect, but it is subject to the overriding principle that no one by his private stipulation can oust these courts of their jurisdiction in a matter that properly belongs to them.

The Fehmarn, [1958] 1 Weekly L.R. 159, 161-62 (C.A. 1957). Finally a federal judge has concluded:

> With th[e] proposition [that the parties cannot oust a court of jurisdiction] there can be no quarrel. However, the very fact that it is so well established tends to reduce its value, since parties to an exclusive forum arrangement are unlikely to intend a purpose which they must realize cannot be achieved. Therefore, in drafting their agreement they would normally mean not to deprive some courts of jurisdiction but

> to express their desire that these courts relinquish jurisdiction in deference to what was at least originally the belief that suits could be better or more conveniently tried someplace else.

Geiger v. Keilani, E.D. Mich. 1967, 270 F. Supp. 761, 765 (Freeman, C.J.)[21]

I cannot believe that jurisdictional ouster is a real issue. We are willing to dismiss a suit of which we have jurisdiction if it is between aliens.[22] And federal courts have not been chary of "losing jurisdiction" in other areas. In habeas corpus cases from state courts, federal courts decline to exercise jurisdiction until a prisoner has exhausted state remedies. The exhaustion doctrine, now codified, 28 U.S.C. § 2254(b), was characterized not as a jurisdictional bar, but as an argument of comity — to decline, in favor of state courts, jurisdiction that we possessed. *Fay v. Noia*, 1963, 372 U.S. 391, 418, 83 S.Ct. 822, 9 L.Ed.2d 837, 856-57. The abstention doctrine is similar. "Abstention allows a federal court whose *jurisdiction has been properly invoked* to postpone decision, pending trial in a state court, when the result might turn on issues of state law." Note, Federal - Question Abstention: Justice Frankfurter's Doctrine in an Activist Era, 80 Harv.

---

[21] Compare Judge Frank's statement in *Knut Knutsen*: "It might be said that the court took jurisdiction and granted specific performance . . . ." 187 F.2d at 991 n. 1.

[22] *See Anastasiadis, supra* note 3; Burt v. Isthmus Dev't Co., 5 Cir. 1955, 218 F.2d 353, 356, *cert. denied*, 1955, 349 U.S. 922.

L. Rev. 604 (1967) (emphasis supplied).[23] The doctrine of forum non conveniens has also allowed a court with jurisdiction of a suit to refuse to hear the controversy where a more convenient forum is available. *Gulf Oil Corporation v. Gilbert*, 1947, 330 U.S. 501, S.Ct. , 91 L.Ed. 1055. If in all these cases we can recognize that other policies militate against the formal notion that once we have jurisdiction we must exercise it, surely we can undertake the task which *Carbon Black* neglected, of weighing the arguments against forum clauses. It is time to lose our fixation with the ancient notion of physical power — that because a tort occurs within this Court's "mare nostrum" we would be derelict not to decide the case.[24]

III.

What does emerge from the history, the cases, and the commentary is a legitimate concern for the bargaining conditions in which the forum agreement was made and the quality of the remedy available to the parties if the agreement is enforced. These two concerns encompass several relevant factors that have

[23] *See* Reetz v. Bozanich, 1970, U.S. , 90 S.Ct. 25 L.Ed.2d 68.

[24] Other attempts to justify the broad rule against forum clauses have been no more successful. Attempts to distinguish arbitration by observing that arbitration "was not a limitation on the forum, but rather was an agreement to eliminate the need for any forum whatever", Bergman, Contractual Restrictions on the Forum, 48 Calif. L. Rev. 438, 439 (1960), are simply not convincing. The argument that a party's choice of forum is a substantial right not to be bartered away, *id.* at 328-29; *Morse*, *supra*, 22 L.Ed. at 368, is conclusory like the *Carbon Black* statement that forum clauses are against public policy. Neither position gives reasons why it should be accepted.

been isolated. (1) Did the parties freely and intelligently enter their agreement? In contracts of adhesion, where one party possessed overweening bargaining power or where there was no opportunity to negotiate the terms, and of course where fraud has occurred, courts are unwilling to deny a plaintiff his forum on the basis of the contractual stipulation.[25] (2) Would the stipulated forum in rendering its decision transgress an important public policy of the present forum? In cases of bankruptcy, divorce, successions, real rights, and regulation of public authorities, for example, courts cannot remit the dispute to a foreign forum lest a foreign court render a decree conflicting with our ordering of these affairs.[26] And in cases where objectionable activity within our jurisdiction would be encouraged by the foreign court's decree, we would reach a similar result. *Cf.* The Kensington, 1902, 183 U.S. 263, S.Ct. , 46 L.Ed. 190. (3) Will the designated forum adjudicate the parties' dispute? A court may postpone declining jurisdiction until it is sure the foreign court will hear the dispute and provide a remedy. *See, e.g., Swift & Company Packers v. Compania Colombiana*, 1950, 339 U.S. 684, 697-98, S.Ct. , 94 L.Ed. 1206, 1215. (4) Is the designated forum seriously inconvenient for the trial of the action? Since

---

[25] This may be a better rationale for cases that refuse to enforce forum clauses in passenger and baggage tickets. *See, e.g.*, Muoio v. Italian Line, E.D.Pa.1964, 228 F. Supp. 290; Note, Validity of Contractual Stipulation Giving Exclusive Jurisdiction to the Courts of One State, 45 Yale L. J. 1150 (1936).

[26] *See* Article 3, Draft of a Convention on the General Jurisdiction of Contractual Forums Adopted by the Ad Hoc Committee, December 20, 1963, The Hague Conference on Private International Law, 13 Am. J. Comp. L. 160 (1964).

we recognize in the doctrine of forum non conveniens that a jurisdictionally selected forum should sometimes give way to another in the face of strong arguments of convenience, it would be anomalous to ignore those considerations where the parties have selected a forum without the benefit of hindsight.

This list is not exhaustive but is exemplary of relevant considerations. But since these concerns can be isolated and since forum clauses can provide such a clear benefit of certainty in international trade, we should be satisfied to apply these concerns to individual cases rather than reject all forum agreements. The burden of proof should be on the party objecting to the designated forum to support his objections. *Maryland Casualty*, 367 F.2d at 345; *Youngdahl*, 209, A.2d at 816. The fourth factor in particular must not become just another label for the doctrine of forum non conveniens. It is essential to remember that the parties expressed in their agreement the judgment that on balance a particular forum was most convenient for trial of their disputes.[27] The burden should rest upon the party objecting to that forum to show a significant balance of greater inconvenience in litigating in the designated forum.

The majority has intimated that the forum clause at issue here would fail to qualify even under this more charitable approach, and holds that the factors

---

[27] *Youngdahl*, *supra* note 45, at 816: "Mere inconvenience or additional expense is not the test of unreasonableness since it may be assumed that the plaintiff received under the contract consideration for these things."

in this case justify the district court's discretionary refusal to disturb the plaintiff's choice of forum. If the test I advocate is the correct one, however, there was no proper exercise of discretion by the district court. That court's memorandum order demonstrates that it invalidated the forum clause under *Carbon Black* and then, ignoring the forum clause, declined to dismiss on a forum non conveniens theory.[28] The district court's conclusion, apart from the authority of Carbon Black, was that "[t]he balance of conveniences here is not strongly in favor of Defendant and Plaintiff's choice of Forum should not be disturbed". A proper approach to a forum clause should reverse that burden. It is a truism that we do not observe an exercise of discretion that was misled by an erroneous view of the law. And to dispel any notion that this forum clause was unreasonable as a matter of law, I canvass the factors I have suggested.

(1) Zapata has neither presented evidence of nor alleged fraud or undue bargaining power in the agreement. Unterweser was only one of several companies bidding on the project. No evidence contradicts its Managing Director's affidavit that it specified English courts "in an effort to meet Zapata Off-Shore Company half way". Zapata's Vice President has declared by affidavit that no specific negotiations con-

---

[28] The district court cited *Muller*, but its analysis clearly placed the burden on the defendant to justify the transfer, as is proper under a forum non conveniens approach. The court relied on Mobile Tankers Co. v. Mene Grande Oil Co., 3 Cir. 1966, 363 F.2d 611, *cert. denied* 1966, 385 U.S. 945, for its criteria, that "'[u]nless 'the balance is strongly in favor of the [Respondent], [the libellant's] choice of forum should rarely be disturbed.'"

cerning the forum clause took place. But this was not simply a form contract with boilerplate language that Zapata had no power to alter. The towing of an oil rig across the Atlantic was a new business. Zapata did make alterations to the contract submitted by Unterweser. The forum clause could hardly be ignored. It is the final sentence of the agreement, immedfately preceding the date and the parties' signatures. Perhaps more evidence could be accumulated, but under this evidence Zapata has not met the burden of showing that it was pressured into the forum stipulation.

(2) I conclude that the English courts would provide an adequate remedy and would contravene no important American public policy. In dealing with forum non conveniens, the majority intimates that the district court's discretion to decline jurisdiction was limited because Zapata is an American citizen and the English courts would violate our public policy. The towage contract provided:

> 1. * * *
>
> Urag [Unterweser], their masters and crews are not responsible for defaults and/or errors in the navigation of the tow.
>
> 2. * * *
>
> b) Damages suffered by the towed object are in any case for account of its Owners.

On the premise that the English courts would apply English law rather than American in this situation and upon the affidavit of Zapata's English law expert that English courts will enforce the contract, the ma-

jority concludes that our policy against enforcing exculpatory clauses might be violated if the controversy proceeded to England.

Of course if Zapata had chosen to abide by the contractual stipulation of forum the case would have proceeded in England and we would have had no opportunity to enforce this public policy. But beyond that, we should be careful not to over-emphasize the strength of the policy. According to *Bisso v. Inland Waterways Corporation*, 1955, 349 U.S. 85, 91, 75 S.Ct. 629, 99 L.Ed. 911, 918,[29] two concerns underlie the rejection of exculpatory agreements: that they may be produced by overweening bargaining power; and that they do not sufficiently discourage negligence. *Bisso* applied these concerns to towage contracts in admiralty jurisdiction. Yet when we sit in diversity we will enforce an exculpatory clause in favor of a railroad. *Sedboard Coast Line Railroad Company v. Tennessee Corporation*, 5 Cir. 1970, 421 F.2d 970. Neither there nor in the case of insurance contracts do the dangers strike us as so serious that federal courts cannot enforce the state law. The question here is whether the fact that a towage contract is involved and the fact that we are sitting in admiralty require us to outlaw a forum that might enforce exculpatory clauses. I believe the policy is

---

[29] Dixilyn Drilling Corp. v. Crescent Towing & Salvage Co., 1963, 372 U.S. 697, 83 S.Ct. 967, 10 L.Ed.2d 78, reversed per curiam our enforcement of a towage clause assigning all liability to a barge owner solely on the authority of two earlier companion cases, *Bisso*, and Boston Metals Co. v. S/S "Winding Gulf"; 1955, 349 U.S. 122, 75 S.Ct. 649, 99 L.Ed. 933. Since *Winding Gulf* was also decided on the authority of *Bisso*, *Bisso* appears to be the determining authority.

not so strong. *Bisso* depends less on the questions of public policy involved than on the long line of authority which it believed established a federal rule barring enforcement of such contracts.[30] Although the question has been settled by the Supreme Court for federal courts, we would unduly extend its scope in refusing to enforce a forum clause simply because a foreign forum may enforce an exculpatory clause. Here the conduct in question is that of a foreign party occurring in international waters outside our jurisdiction. The evidence disputes any notion of overreaching in the contractual agreement. And for all we know, the uncertainties and dangers in the new field of transoceanic towage of oil rigs were so great that the tower was unwilling to take financial responsibility for the risks, and the parties thus allocated responsibility for the

---

[30] *Bisso* was only a four-Justice opinion. The fifth, Justice Douglas, concurred only because he professed ignorance of the "economics and organization of this business". He admitted that the Court's rule might be "outmoded" and in need of change, that the tugboat industry might be "less able to carry the risks of . . . losses than its customers, and that it might be "fairer in the long run" to allow the tugboat operator to transfer liability. But in the absence of a record that threw light on those "large questions of policy", he was unwilling to change what he considered an already established rule in the federal courts. Justice Frankfurter, joined by Justices Reed and Burton, wrote a telling dissent seriously questioning the Court's use of its authorities and reaching the conclusion that the courts should not intervene to upset the arrangements of private parties where there was no evidence of inequality of bargaining power or of concentrated ownership or of unavailability of services by other tugs who would not require exculpatory clauses. In Frankfurter's words, the argument that irresponsibility would be stimulated "has little force, unless we are prepared also to forbid the tug to insure against such losses or liabilities". 349 U.S. at 119, 99 L.Ed. at 932.

voyage to the tow.[31] It is equally possible that the contract price took this factor into account. I conclude that we should not invalidate the forum selection clause here unless we are firmly convinced that we would thereby significantly encourage negligent conduct within the boundaries of the United States.[32] At the very least, before excluding the forum clause, we should remand to the district court for compilation of a record dealing with the economic relationships

---

[31] Compare our argument in Seaboard Coast Line R.R. v. Tennessee Corp., 5 Cir. 1970, 421 F.2d 970, 974: An exculpatory clause "merely means that if such an injury occurs the parties need not undertake to go to battle to determine whose negligent act, if in fact there was negligence at all, produced the injury .... In effect, it seems to us, that in light of the relation of the parties here, the railroad company was simply not willing to permit conjunctive use of railroad equipment by an industrial concern which may well be presumed not to have the same skill in operation of railroad equipment as the railroad company itself without requiring of the industry that it assume absolute liability with respect to any injuries resulting therefrom".

[32] It is true that The Kensington, 1902, 183 U.S. 263, 46 L.Ed. 190, holds that federal courts are not to enforce a foreign law against our public policy where part of a contract is executed in the United States. But in *The Kensington* the defendant was a New Jersey corporation and thus a logical object of regulation by American courts. Here we deal with a foreign national operating at the time of the mishap outside our jurisdiction. In this context, I believe it is not a semantic argument to contend that enforcement of a forum clause is sufficiently attenuated from enforcement of substantive law contrary to our public policy that we do not run afoul of *The Kensington*.

Lest it be thought I thus throw open a route for United States towage contracts to escape the rule of *Dixilyn*, I observe that where both parties are American, and the tow is performed here, it is difficult to see how the towee could fail to prove a foreign forum clause unreasonable. Whether a foreign tower who suffered a mishap while operating within our jurisdiction could take advantage of a forum clause remitting him to a more favorable forum I need not now decide.

in this industry and the consequences of enforcing forum clauses in this international context.

Zapata's American citizenship may very well be an argument in some cases for refusing to decline jurisdiction on the basis of forum non conveniens.[33] *Swift & Company Packers v. Compania Colombiana*, 1950, 339 U.S. 684, S.Ct. , 94 L.Ed. 1206, decided on forum non conveniens principles (no forum clause was mentioned) that it would not deny an American citizen his American forum primarily because there was no assurance that the defendant would appear with adequate security in the foreign court. Here, of course, Unterweser and Zapata have already joined argument in the English courts, the English courts have ruled that they have jurisdiction, and Unterweser has offered to post the same security that is available to Zapata here. The Supreme Court in Swift, moreover, expressly declined to decide the "abstract question whether United States admiralty courts may decline jurisdiction over libels brought by United States citizens". 339 U.S. at 697, 94 L.Ed. at 1215. In this case we deal with a situation where Zapata voluntarily and specifically surrendered in the contract its right to proceed in American courts. *See Cerro de Pasco Copper Corp. v. Knut Knutsen*, 2 Cir. 1951, 187 F.2d 990, 991 (*Swift* "inapposite" in context of a forum clause). A proper solicitation for the interests of American citizens may militate in favor of enforcing these clauses. Otherwise, Americans who wish to contract with foreign nationals and who are willing to accept a forum clause will

[33] *See* Annot., 48 A.L.R. 2d 800 (1956) (and Later Case Service).

have difficulty in convincing the foreign party that he can rely on the agreement.[34]

(3) The availability of the English forum is certain. Soon after Zapata brought its action in the district court, Unterweser moved that court to decline jurisdiction and initiated proceedings for breach of contract and moneys due in the High Court of Justice, London, England, as the forum provision directs. Zapata appeared in the London court and moved to dismiss the summons on three grounds: that the English court was not a convenient forum; that proceedings between the parties were underway in the United States; and that the writ had been improperly served. The High Court of Justice ruled that it had jurisdiction, that the summons had been properly served, and that the action should proceed. Zapata appealed. The English Court of Appeal affirmed, holding that the forum provision was reasonable and that Zapata had made no

---

[34]Burt v. Isthmus Dev. Co., 5 Cir. 1955, 218 F.2d 353, *cert. denied*, 1955, 349 U.S. 913, cited by the majority at fn. 37, can be distinguished on several grounds. First, although the factual statement mentions that under the contract the parties submitted to Mexican jurisdiction and waived the jurisdiction of other courts, that element played no part in the decision because the Court found that the basic issue of dispute was whether "negotiations ever matured into a contract". *Id.* at 358. Second, *Burt*, a diversity case, specifically recognized that "[i]n admiralty, courts have often refused to entertain actions . . . between citizens and aliens where foreign law would govern the issue, and have relegated the litigants to the foreign court". *Id.* at 356. Finally, *Burt* followed *Swift's* example and expressly declined to hold that an American citizen's suit could not be dismissed even in nonadmiralty cases. If *Burt* requires "positive evidence of unusually extreme circumstances" and a conviction "that material injustice is manifest", *Id.* at 357, before enforcing a forum clause, it is subject to the same criticisms as *Carbon Black*.

showing which would compel the Court to refuse to enforce the agreement.[35] Thus, the English courts have

---

[35]Lord Justice Willmer said:

* * *

> The law on the subject, I think, is not open to doubt, and I do not think that it is really necessary to cite the authorities to which we have been referred. It is always open to parties to stipulate (as they did in this case) that a particular court shall have jurisdiction over any dispute arising out of their contract. Here the parties chose to stipulate that disputes were to be referred to the "London" court, which I take as meaning the High Court in this country. *Prima facie* it is the policy of the court to hold parties to the bargain into which they have entered. *Prima facie* it is to be presumed, therefore, that the plaintiffs should have leave to prosecute their proceedings in this country, and in pursuance of that to serve their writ out of the jurisdiction. But that is not an inflexible rule, as was shown, for instance, by the case of *THE FEHMARN*, in which I was myself concerned, and which came to this court. That was a case in which the court in its discretion declined to give effect to a stipulation made by the parties in their contract conferring jurisdiction on a foreign court.
>
> I approach the matter, therefore, in this way, that the court has a discretion, but it is a discretion which, in the ordinary way and in the absence of strong reason to the contrary, will be exercised in favour of holding parties to their bargain. The question is whether sufficient circumstances have been shown to exist in this case to make it desirable, on the grounds of balance of convenience, that proceedings should not take place in this country, the stipulated forum, but that the parties should be left to fight their battles in the United States of America.
>
> * * *
>
> I am unable to see that the judge acted on any wrong principle. . . . nor am I prepared to say that the judge's exercise of his discretion is shown to have been plainly wrong.

Lord Justice Diplock added:

* * *

ruled that they will hear the controversy. Furthermore, when Unterweser advised the district court that it had initiated the action in England, it offered to keep available all the security given in the initial action — $3,500,000 — to satisfy any relief Zapata might obtain in London.

(4) The majority concludes that factors of convenience do not justify dismissing the action. But the majority treats the question under the doctrine of forum non conveniens the standard for which is that the plaintiff's choice of forum "should rarely be disturbed" unless "the balance is strongly in favor" of the defendant. *Gulf Oil Corporation v. Gilbert*, 1947, 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055. I submit that when a forum clause is involved our standard should be not to disturb the *contractual* choice of forum unless "the forum chosen by the parties would be a seriously inconvenient

---

I say again in this case, as I said in *Mackender*: "Where parties have agreed to submit all their disputes under a contract to the exclusive jurisdiction of a foreign court, I myself should require very strong reason to induce me to permit one of them to go back on his word". We should, I think, apply the same principle whether the forum of contractual choice is England or of some other country.

Lord Justice Widgery concluded:

> . . . The parties here have quite deliberately chosen that their disputes shall be decided in the courts of this country, and it would need strong grounds in my view to deprive either party who sought to take advantage of that course from receiving the advantage which he expects from it. I also would put my decision on the footing that there is no reason here to suppose that the learned judge exercised his discretion improperly. But, like my Lord, I feel that had I had to decide the matter myself, I should have reached precisely the same conclusion.

one for the trial of the particular action". Restatement (Second) of Conflict of Laws § 80, Comment, *supra* note 5. From this perspective I conclude that factors of convenience do not justify refusing the motion to decline jurisdiction.

The majority considers the following factors relevant: the casualty occurred close to the Fifth Circuit and the district court; a "considerable number" of witnesses live on the Gulf Coast; preparations for the voyage, inspection of the damage and repair work were performed here; depositions of the Bremen's crewmen are available; and there are no contacts with the English forum. Thus, they agree with the district court, which concluded that a "great majority, if not all, of the witnesses are or were in the United States, including an alleged forty potential witnesses residing permanently here". But this observation appears to ignore the fact that most of Unterweser's witnesses reside in Germany — the twenty-three crew members of the Bremen, Von Aswegen, Managing Director of Unterweser, personnel from the builders of the Bremen and the independent contractors who outfitted the vessel, individuals with companies for whom Bremen has previously towed. If is true that depositions of the German crew members are available because Zapata obtained them immediately after filing its libel. But if, as is likely, Zapata's witnesses are its crewmen (on the Chaparral) and Unterweser's witnesses are its crewmen (on the Bremen), the inference from that observation is that Zapata should have live witnesses at trial while Unterweser relies on depositions. Presumably depositions of the American witnesses could be taken for an English trial, or both sides could face

the same difficulty of transporting their witnesses. Although the voyage began here and the casualty occurred nearby, the tug was built in Germany and had its home port in Bremen. As the High Court of Justice observed, "There is probably a balance of numbers in favor of the Americans, but not, as I am inclined to think, a very heavy balance". The fact that no contacts exist with the English forum is not determinative. That forum was chosen as a logical compromise should a dispute arise.[36] The English court has the advantage

---

[36] *Cf.* Mittenthal v. Mascagni, 1903, 183 Mass. 19, 66 N.E. 425, 426-27:

> We can fancy the parties to this contract at the time of making it saying something like this: "As the performance of this contract will not only involve travel through one or more foreign countries in getting to America and returning, but will involve journeying long distances through a great many independent states, each of which has its own courts and system of laws, under some of which a person sued in a civil action, when about to leave the state, may be arrested and held to bail or in imprisonment, if suits may be brought in any one of these numerous jurisdictions there is a liability to great trouble and expense on the part of the defendant in meeting the litigation. The contract contemplates a service of fifteen weeks, after which Maestro Mascagni intends to return to his permanent home, in Florence. It will be better and more reasonable for both of us to provide that our controversies, if any arise, shall be settled by the courts of Florence, than to leave both parties subject to suits in forty or fifty different jurisdictions, at great distances from the home of either." If, moved by such considerations, the parties made the agreement in question, shall the court say that they were non compotes mentis, and that their agreement was so improvident and unreasonable that it cannot be permitted to stand?

Of course if Zapata is correct, that the contract relieves Unterweser from liability for negligence and the English courts will enforce it, then there will be no inconvenience at all, for Zapata will not try to prove negligence.

of dividing the inconveniences between the disputants. An English-speaking court with common-law traditions is probably more amenable to American plaintiffs than the German courts with which there are "contacts". Finally, the English court may very well have been chosen for the law it would apply. That factor may have enabled Zapata to obtain the low bid from Unterweser. I conclude, therefore, that Zapata has not justified disturbing the contractual choice of forum.

* * * *

For all these reasons, I believe we should overrule *Carbon Black* and remand this case to give the district court an opportunity to find the relevant facts and exercise its discretion in light of the "modern and correct rule".[37] If the district court should properly have declined to exercise its jurisdiction, then of course it should not have enjoined the London action. Given the majority's conclusion that the district court properly retained jurisdiction, however, I do not disagree with its analysis that the injunction was then proper.

---

[37] Unterweser filed a limitation action one week before the time for filing lapsed because the district court had not yet ruled on its motion to dismiss. I do not believe it is thereby estopped from pressing its motion to dismiss.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 27497

In the Matter of the Complaint of
UNTERWESER REEDEREI, GmbH,

ZAPATA OFF-SHORE COMPANY,
Plaintiff-Appellee

versus

M/S BREMEN and UNTERWESER REEDEREI GmbH,
Defendants-Appellants.

Appeal from the United States District Court for the Middle District of Florida

---

Before BROWN, Chief Judge, WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, SIMPSON, MORGAN, CLARK and INGRAHAM, Circuit Judges.

BY THE COURT:

A member of the Court in active service having requested a poll on the application for rehearing en banc and a majority of the judges in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that the cause shall be reheard by the Court en banc on briefs without oral argument. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 27497

In the Matter of the Complaint of
UNTERWESER REEDEREI, GMBH

ZAPATA OFF-SHORE COMPANY,
Plaintiff-Appellee,

versus

M/S BREMEN and UNTERWESER REEDEREI, GMBH,
Defendants-Appellants.

Appeal from the United States District Court for the Middle District of Florida

---

(June 28, 1971)

ON PETITION FOR REHEARING EN BANC

Before BROWN, Chief Judge, WISDOM, GEWIN, BELL,* THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, SIMPSON, MORGAN, CLARK, INGRAHAM and RONEY, Circuit Judges.

---

*Judge Bell did not participate in the consideration or decision of this case.

PER CURIAM: Upon consideration of this cause en banc the Court adopts the majority opinion and judgment of the panel, 428 F.2d 888 (5th Cir. 1970).

WISDOM, Circuit Judge, dissenting, joined by Judges Thornberry, Goldberg, Godbold, Simpson and Clark:

Again I feel impelled to dissent in this case. It is incredible that a court should fail to honor an agreement between a foreign corporation and a domestic corporation to settle their contractual disputes in a neutral forum according to the law of a neutral country long used to its courts' settling admiralty disputes.

The issue as stated in the majority opinion is as follows:

> The question we must decide is whether the district court was *obliged* to decline to exercise admitted jurisdiction under the facts of the admitted case. ___ F.2d ___ (Emphasis added).

In support of its position, the Court quoted the following statement from *Carbon Black Export Inc. v. The S.S. Monrosa*, 5 Cir. 1958, 254 F.2d 297, 300, *cert. dismissed*, 1959, 359 U.S. 180, *rehearing denied* 359 U.S. 999:

> In essence, the motion [to decline jurisdiction] was based upon Clause 27 as buttressed by the doctrine of forum non conveniens. Any consideration of such a question starts with the universally accepted rule that agreements in

advance of controversy whose object is to *oust the jurisdiction* of the courts are contrary to public policy and will not be enforced. (Emphasis added).

The issue here is not whether the Court is "obliged" to decline to exercise jurisdiction. It is not whether parties can "oust the jurisdiction of the courts". In this case and similar cases the parties assume that the local court has jurisdiction but agree that in the absence of unreasonable circumstances the court should exercise its jurisdiction only to the extent of giving effect to the choice of forum clause just as courts give effect to any clause expressing the intention of the contracting parties. The issue is whether in the circumstances of this case it is unreasonable for the court to enforce the bargain struck on an international transaction by two companies of diverse nationalities well able to take care of themselves in negotiating a contract.

The contract was not between some indigent American seaman and Greek shipowner to try disputes in Piraeus, Greece.[1] It was not a towing contract in in-

[1]It has been noted that, "If *Zapata* postulates that forum clauses are against public policy, the Fifth Circuit's opinion in Anastasiadis v. S.S. Lttle John, 5 Cir. 1965, 346 F.2d 281, becomes very difficult to explain. Comment, 8 Houston L. Rev. 739, 743 (1971). In *Anastasiadis* a Greek seaman had contracted in Greece for employment on a vessel of Liberian registry. Although a Liberian corporation owned the vessel, that corporation was in turn wholly owned and controlled by an American corporation, in turn wholly owned and controlled by a United States citizen. The contract, written in Greek, provided that the seaman would join the vessel at Houston, Texas. But it stated that Greek law would govern disputes and designated the Greek

land American waterways with the towage company having superior bargaining leverage.[2] The contract in this case required the towage company to tow a six million dollar drilling rig from Venice, Louisiana, near the mouth of the Mississippi, through the Gulf of Mexico, across the Mediterranean, and up the Adriatic to Ravenna, Italy. Zapata, owner of the rig, solicited bids from several towing companies. The low bidder, Unterweser, a German company, generally inserts in its contract a provision for trial of disputes in German courts according to German law. The choice of forum provision was an essential element in the final contract, undoubtedly because of the validity of exculpatory clauses in English law and the possibility of the invalidity of exculpatory clauses in towage contracts in American law.[3]

---

courts at Pireaus as the forum. Although a nominal foreign registry is often pierced where American laws are to be enforced against a ship beneficially owned by Americans, this Court declined to do so. We said:

> The contract in the instant case provided not only that Greek law would be determinative but also that the Greek courts were to be the proper forum for the litigation of claims arising out of the contract. We see no reason, in the circumstances of this case, why this provision should not be given effect in the absence of any suggestion in the record that Greece is an inconvenient forum or that Greek law provides an inadequate remedy.

[2] *See* Bisso v. Inland Waterways Corporation, 1955, 349 U.S. 85, 75 S.Ct. 629, 99 L.Ed. 911; Dixilyn Drilling Corporation v. Crescent Towing and Salvage Co., 1963, 372 U.S. 697, 83 S.Ct. 967, 10 L.Ed.2d 78. In *Dixilyn* both parties were American and the tow was to be performed here. *Bisso* emphasized that the exculpatory clause was produced by overweening bargaining power.

[3] In Seaboard Coast Line Railroad Company v. Tennessee Corporation, 5 Cir. 1970, 421 F.2d 970, this Court enforced an exculpatory clause against a railroad.

The Court makes a half-hearted attempt to argue that it "was within the sound discretion of the district court to decline jurisdiction on the basis of forum non conveniens". This doctrine puts the burden on the party asserting it to justify its application. The forum non conveniens theory should have no bearing on this case — at least in terms of the burden of proof. Here the parties have agreed on the forum and the applicable law. In these circumstances Zapata, represented by experienced counsel, should not be allowed to welch on its bargain.

The contention that Unterweser should be treated as having assented to the jurisdiction of the local court by filing the limitation action is a red herring. In the first place, Unterweser (more accurately, the tug Bremen) left international waters to enter the district court's jurisdiction *upon the instructions of Zapata.* Conveniently, Zapata had a United States marshal waiting to arrest the Bremen when the tug entered Tampa Bay with the disabled Chaparral (the drilling rig). And when Unterweser proceeded to move the district court to dismiss the suit, the district court failed to rule on its motion *until after the statutory period for filing a limitation action had elapsed.* Unterweser had already sued in London for breach of contract. Prior to the limitation action, the High Court of Justice had ruled that Zapata had been properly served and that the action should proceed in the English courts.[4]

[4]Zapata appealed the ruling. After Unterweser had filed its limitation action in Tampa, the English Court of Appeal affirmed the High Court of Justice, holding that the forum clause was reasonable, and that Zapata had made no showing to justify the court's refusing to enforce the written agreement.

Thus, the limitation action, filed one week before the expiration of the applicable statute of limitations, was a protective measure. When Zapata moved the district court to restrain further litigation in England, Unterweser moved to stay its own limitation proceeding until the English suit was determined. The majority admits that Unterweser invoked American jurisdiction only reluctantly. The district court may have had the *power* to order Unterweser to cease its English litigation. But *see* 39 U. Cin. L. Rev. 819 (1970).[5] The ques-

---

[5] "Unterweser had moved for the district court to dismiss for lack of jurisdiction, but the court did not rule on the motion. As time passed and the deadline for filing a limitation action in the district court approached, the court still had not ruled on the motions to dismiss. Unterweser was forced to choose one of two alternatives. It could either do nothing and hope that the court would eventually dismiss for lack of jurisdiction, or it could file a limitation action to reduce its liability to the statutory amount — the value of the vessel plus freight revenue due. Unterweser chose the latter alternative and the court held that filing a limitation action mooted the question of jurisdiction. The court of appeals affirmed that holding.

This holding perverts the purpose of a limitation action which is intended to be a defense against multiple claims or a claim in excess of the shipowner's statutory liability and not a device whereby a court can obtain in personam jurisdiction. . . . Thus, in effect, the court forced Unterweser to file the limitation action and then found the filing of the action cured the question of lack of jurisdiction by holding that the filing mooted the question." Note, 39 U. Cinn. L. Rev. 819 (1970).

In 1949 Judge Learned Hand, in his concurring opinion in Krenger v. Pennsylvania Railroad Co., 2 Cir. 1949, 174 F.2d 556, *cert. denied*, 338 U.S. 866, stated:

> [C]ourts have long looked with strong disfavor upon contracts by which a party surrenders resort to any forum which was lawfully open to him. . . . In truth, I do not believe that, today at least, there is an absolute taboo against such contracts at all; in the words of the Restatement, they are invalid only when unreasonable. . . .

tion remains, however, even in terms of the majority's analysis, "whether the district court *properly* refused to stay the limitation proceeding." (Emphasis supplied)

I close with a quotation from a law review comment, Application of the Forum Clause to Commercial contracts, 8 Houston L. Rev. 738, 752 (1971), that appeared after the Court had held its en banc conference on this case:

> VII. Summary
>
> Forum clauses were once "taboo" in American courts. Since 1949, however, courts have been more conciliatory toward these contractual provisions. The "ouster" rationale — used in most pre-Krenger[6] decisions as a basis for rejecting forum clauses — has been discarded in large measure. The "reasonableness" test, developed in Muller[7], gives prima facie vali-

---

[7] Muller & Company v. Swedish American Lines Ltd., 2 Cir. 1955, 224 F.2d 806, *cert. denied*, 1955, 350 U.S. 903, held that courts should enforce a forum clause in an international contract unless it is unreasonable or prohibited by statute. The court pointed out that the burden of proving that the clause is unreasonable, however, is on the plaintiffs, and since the plaintiff received contract consideration for the agreement to litigate all claims in the stipulated forum, "mere inconvenience or additional expense is not the test of unreasonableness.... The plaintiff cannot prevail in derogation of the forum clause if the stipulated forum is available and can render "substantial justice" to him.

In the instant case, the majority stated that Indussa Corporation v. S.S. Ranborg, 2 Cir. 1967, 377 F.2d 200, overruled this part of *Muller*. But *Indussa's* decision not to enforce a forum

dity to forum clauses and places the onus on the plaintiff to show that the clause is unreasonable. This test has been accepted by the latest revision of the *Restatement*, the majority of the courts which recently have considered forum clauses, and most of the legal scholars who have written on the problem. Acceptance of the prima facie validity of forum clauses has these advantages: (1) it vitiates the legal fiction of ouster; (2) it reinforces the principle of party autonomy; and (3) it gives discretion to the trial judge who may weigh all the equities. Since the *Muller* test is basically one of discretion, there is always the danger of abuse, especially from jurists who wish to assure to parties who reside within their jurisdiction an open court. On balance, however, the *Muller* test is sound, and it is difficult to imagine any court long rejecting a criterion which is universally referred to as the "reasonableness" test.

The decision of the majority is a backward step by a forward-looking court. It has no place in a shrinking world where international commercial transactions are becoming increasingly commonplace. The safeguard against abuse of the forum clause is the local court's power to determine the reasonableness of en-

---

clause derived from its view that the Carriage of Goods by Sea Act, 46 U.S.C. §§ 1300-15, where applicable, prohibited such clauses. COGSA did apply to *Muller* (as it did to Carbon Black) and for that reason *Muller* was overruled.

forcing the clause. But the burden of proving unreasonableness should fall on the party seeking to escape from the obligation he contracted to undertake. Zapata has failed to show any good reason for backing out of its bargain.

SIMPSON, Circuit Judge, dissenting:

I respectfully dissent, for the reasons set forth in Judge Wisdom's dissent from the panel decision In the Matter of the Complaint of UNTERWESER REEDEREI, GMBH, ZAPATA OFF-SHORE COMPANY v. M/S BREMEN and UNTERWESER REEDEREI, GMBH, 5 Cir. 1970, ____ F.2d ____ [No. 27,497, June 19, 1970].

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

October Term, 1969

No. 27497

D. C. Docket No. Civ. 68-290-T & 68-21-T
In the Matter of the Complaint of

UNTERWESER REEDEREI, GMBH
ZAPATA OFF-SHORE COMPANY,
Plaintiff-Appellee,

versus

M/S BREMEN and
UNTERWESER REEDEREI GMBH,
Defendants-Appellants.

Appeal from the United States District Court for the Middle District of Florida

---

Before BROWN, Chief Judge, WISDOM, GEWIN, BELL,* THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, SIMPSON, MORGAN, CLARK, INGRAHAM and RONEY, Circuit Judges.

JUDGMENT ON REHEARING EN BANC

This cause came on to be heard on rehearing en banc without oral argument..

ON CONSIDERATION of this cause en banc the Court adopts the majority opinion and judgment of the panel dated June 19, 1970, and the order of the District Court appealed from in this cause, be, and the same is hereby, affirmed;

It is further ordered that defendants-appellants pay to plaintiff-appellee, the costs on appeal to be taxed by the Clerk of this Court.

June 28, 1970

WISDOM, Circuit Judge, dissenting, joined by Judges Thornberry, Goldberg, Godbold, Simpson and Clark:
SIMPSON, Circuit Judge, disssenting:
Issued As Mandate: Jul 20 1971

---

*Judge Bell did not participate in the consideration or decision of this case.

Telefax WESTERN UNION Telefax

923P GDT OCT 11 87 NE669 SYA705
SY CDV898 WUT505 UY5033 LH0423 159/158 PD INTL 1/50 CO LONDONLH
VIA RCA 11 2705
LT MISS HOYT TAYLOR ZAPATA OFFSHORE CO
2000 SOUTHWEST TOWER BLDG HOU
PERSUANT TO DISCUSSION WITH GENE SHIELDS REGARDING TOWING OF
CHAPARRELL FROM GULF COAST TO RAVENNAITALY WOULD LIKE TO OFFER
ON BEHALF OF UNTERWESER REEDEREI BREMENGERMANY WHO I REPRESENT
OUR NEW TUG BREMEN 7500 HORSEPOWER KORT NOZZLE 72 TONS
END 1

Telefax WESTERN UNION Telefax

SY CDV893 2/50
BOLLERO PULL RADIUS OF ACTION 16000 NAUTICAL MILES AT DAILY
HIRE RATE OF 1900 DOLLARS PLUS 35000 DOLLARS MOBILIZATION FEE
COVERING BALLAST TRIP FROM EUROPE TO US GULF COAST SHOULD RUNNER
CREW BE DESIRED CAN FURNISH AT 30 DOLLARS PER DAY PER MAN FOR
TIME SPENT ON TIG PLUS 15
END 2

Telefax WESTERN UNION Telefax

The time now shown in the date line on domestic telegrams is LOCAL TIME at point of origin. Time of receipt is LOCAL TIME at point of destination

SY CDV898 3/50
DAYS ALSO PREPARED TO ARRANGE INSURANCE COVERING TOWAGE RISK
FOR RIG IF DESIRED OR GUARANTEE SAME PREMIUM RATE AS MAY BE
OFFERED BY UNDERWRITERS FOR OTHER TUG COMPANIES IF POSSIBLE
PLEASE REPLY BY OCTOBER 15TH AS BREMEN READY TO SAIL FROM NORTH
SPAIN ON OCTOBER 17TH TO ARRIVE GULF COAST
END 3

Telefax WESTERN UNION Telefax

The time now shown in the date line on domestic telegrams is LOCAL TIME at point of origin. Time of receipt is LOCAL TIME at point of destination

SY CDV898 4/8
NOVEMBER FIRST
JOHN ORTON 48 LOWNDES SQUARE LONDONSW1

CFN 48 LONDONSW5.

FAX-8

12 AM 8

ATTENTION MR. E.F.SHI[illegible] 296 received 11/11/67 10/21/67

RE: TOWAGE ''CHAPARRAL'' FROM NEW ORLEANS TO RAVENNA, SAILING 15TH OF NOVEMBER 1967 APPR. -

---

AFTER CAREFUL CONSIDERATION OF ALL DATA SUPPLIED BY YOUR SENIOR VICE PRESIDENT MR. E.F.SHIELS AND YOUR MANAGER DRILLING OPERATIONS MR. L.V.BUSTER WHITTINGTON TO OUR MR. ARTHUR WIJSMULLER AND MR. F.J.JONKMAN DURING PLEASANT MEETING IN BRUSSELS ON WEDNESDAY 18TH OCTOBER 1967 AND BEARING IN MIND THAT LEGS WILL PROTRUDE AT LEAST 55 FEET UNDER BOTTOM DURING TOW WE HEREWITH SUBMIT OUR QUOTATION FOR THE ABOVE TOW AS FOLLOWS;

A) TOW TO BE PERFORMED BY ONE OF OUR 5375 IHP/3000 BHP TUGS, BOLLARDPULL 35 TONS OF 1000 KG, PROPELLER TURNING IN A NOZZLE PLUS ONE OF OUR 2950 IHP/2000 BHP TUGS, BOLLARDPULL 24 TONS OF 1000 KG, FITTED WITH A CONTROLLABLE PITCH PROPELLER

B) FOR MOB AND DEMOB A LUMPSUM WILL BE CHARGED OF USDOLLARS 65000 OF WHICH 50 PERCENT WILL BE PAYABLE ON DEPARTURE OF TOW FROM NEW ORLEANS AND 50 PERCENT UPON ARRIVAL OF TOW AT DESTINATION

C) DAILY HIRE OF USDOLLARS 1700 FOR THE 5375 IHP TUG AND OF USDOLLARS 1400 FOR THE 2950 IHP TUG TO BE CHARGED FROM THE MOMENT BOTH TUGS WILL HAVE ARRIVED AT NEW ORLEANS AND ARE BOTH READY TO MAKE UP TOW UNTIL EACH TUG WILL BE DISMISSED AFTER ARRIVAL AT DESTINATION
THE DAILY HIRE FOR THE TUGS TO BE PAID WEEKLY FOR SEVEN DAYS STOP THE FIRST PAYMENT TO BE MADE ONE WEEK AFTER SAILING OF THE TOW FROM NEW ORLEANS

D) ALL PAYMENTS TO BE EFFECTED IN HOLLAND TO THE CREDIT OF OUR ACCOUNT WITH OUR BANKERS MESSRS. H.ALBERT DE BARY AND CO N.V. IN AMSTERDAM

E) IF CONTRACT AWARDED TO US OUR MR. JONKMAN WILL COME TO HOUSTON AND/OR NEW ORLEANS IN ORDER TO STUDY WITH YOUR TECHNICAL STAFF THE POSSIBILITIES OF TOWING THE ''CHAPERRAL'' WITH LEGS RIGGED HIGHER THAN NOW PROPOSED ESPECIALLY DURING PERIODS OF EXTREME NICE WEATHER IN ORDER TO INCREASE TOWING SPEED AND SAFE TIME AND MONEY.

F) QUOTATION IS WITHOUT ENGAGEMENT AND IS BASED ON TERMS AND CONDITIONS OF OUR NORMAL TOWING CONTRACT AND ON THE AVAILABILITY OF THE TUGS.

G) A NOTICE OF READINESS OF 18 DAYS IS REQUIRED IN ORDER TO ENABLE US TO ARRANGE THAT THE TUGS ARRIVE IN NEWORLEANS IN TIME.

H) DUE TO THE PRESENT GREAT DEMAND FOR OUR TUGS AN EARLY DECISION WILL BE APPRECIATED.

I) CONTRACT CAN ONLY BE CONSIDERED AS CONCLUDED AFTER YOUR EVENTUAL ACCEPTANCE OF OUR OFFER HAS BEEN RECONFIRMED BY US.

TRUSTING TO HAVE BEEN OF SERVICE, WE REMAIN FAITHFULLY YOURS,

N.V. BUREAU WIJSMULLER.

rec'd 10/21/67

TELEX 41110++++
WELL RECEIVED PSE OVER +?
WELL REVD.

HANSEN & TIDEMANN, INC.

STEAMSHIP AGENTS
CHARTERING BROKERS

Cable Address
ALL OFFICES
"HANDT"

October 26, 1967

P. O. Box 52620
HOUSTON, TEXAS 77052

Mr. H. S. Taylor
Vice President
Zapata Off-Shore Company
2000 Southwest Tower
Houston, Texas 77002

Dear Mr. Taylor:

In reply to your letter of October 19, 1967 and our discussions in connection with the movement of your offshore rig "CHAPARRAL" from New Orleans, Louisiana to Ravenna, Italy on or about November 20, 1967, we are pleased to submit for your consideration the following bid schedule. This is predicated upon the use of the 9600 BHP tug "ALICE L. MORAN".

First 63 days at $3400.00 per day
Next 5 days at $3200.00 per day
Next 5 days at $3000.00 per day
Next 5 days at $2800.00 per day
Next 5 days at $2600.00 per day
Next 5 days at $2400.00 per day
Remaining days at $2300.00 per day

The above schedule does not include mobilization costs and the positioning of the tug. It is estimated that these charges will be approximately $60,000.00.

Due to the anticipated draft of the rig, the height of leg to be carried and the possibility of further ballasting of the legs, the above schedule and any towage arrangement between Moran and your

goodselves will be subject to the inspections of the rig by Moran personnel and the working out of a mutually agreeable towage contract.

We look forward to further discussions with you in this matter and remain

Yours very truly,

B. W. White
Vice President - Sales

BWW/kp
"C".

Contract n: 3968

DRILLING OPERATIONS IN ADRIATIC SEA

COMPANY: AGIP S.p.A.

CONTRACTOR: ZAPATA NORTH SEA, INC.

DAYWORK DRILLING CONTRACT

by and between

AGIP S.p.A. - Direzione Mineraria

and

ZAPATA NORTH SEA, INC.

1 - DATE, PLACE AND PARTIES

This agreement is made on September 20, 1967 in Geneve (Switzerland) by and between the following parties:

COMPANY:

AGIP S.p.A. - Direzione Mineraria - a Corporation with Head Quarters in S.Donato Milanese (Milano) Italy, in its name and in name and behalf of SHELL ITALIANA S.p.A.

CONTRACTOR:

ZAPATA NORTH SEA, INC. - a Panama Corporation with Head Quarters at 2000 Southwest Tower, Houston, Texas 77002, U.S.A.

2 - BASIC AGREEMENT AND DURATION OF THE CONTRACT

The CONTRACTOR hereby agrees to drill wells on COMPANY s Concession in the waters of the Italian Continental Shelf of the Adriatic Sea, South to, but not below 40th parallel, such area being hereinafter called "Operating Area" for oil or gas by the rotary method from a barge owned by the CONTRACTOR.

After drilling one or more wells in the Adriatic Sea, COMPANY may request CONTRACTOR to move barge to other Italian Continental Shelf waters. In such event COMPANY will reimburse CONTRACTOR for actual additional costs, if any, attributable to the tow and other actual addi-

20.11.67 ./.

tional costs of moving CONTRACTOR's personnel and material, to the extent such costs result from the change of operating area.

The CONTRACTOR will put at the disposal of the COMPANY a self-contained, jack-up mobile platform , as described on Schedule "A" attached, herein referred to as the "Barge", for the carrying out of such drilling. The Barge will be capable of drilling in water depths as specified in Schedule "B". The CONTRACTOR further agrees to perform all work and services herein provided in strict compliance with the terms and conditions hereinafter set forth.

This contract will have a duration of two years from the moment the CONTRACTOR's equipment has been moved on the first location, and is ready to pick-up drive pipe, herein called the "Basic Term".

COMPANY shall have the option to extend this contract for two additional periods of six months each by written notice to CONTRACTOR of the exercise of each such option, in the case of the first six month period, 180 days before the end of the Basic Term, and in case of the second six month period, before the end of the Basic Term.

COMPANY shall have the option of extending the specified term until the completion or abandonment of the well on which drilling operations are under way on the date on which this agreement would otherwise expire.

It is agreed that the Barge shall be ready to be taken under tow for Italian waters approximately October 30, 1967. Should the Barge not be under tow by November 20, 1967, COMPANY has the option to rescind this contract by written notice by November 22, 1967.

CONTRACTOR affirms on the basis of the estimate received from the most experienced ocean towing company that the

E.E.I.

towing time from the Gulf of Mexico to Operating Area in the Adriatic Sea will be approximately 65 days. However, the foregoing is subject to weather and sea state encountered and presumes no unforeseen circumstance beyond the CONTRACTOR's control. The CONTRACTOR agrees to use its best efforts to prevent any delays, and to use its best efforts to remove promptly the causes of any delay which occurs. CONTRACTOR agrees to advise COMPANY when Barge goes under tow, and to supply COMPANY such further information on the progress of the tow as CONTRACTOR can obtain.

Prior to moving on the first well location, CONTRACTOR agrees to carry out operating test for the Barge jacking equipment, consisting a jacking out of the water, preloading, establishing the maximum variable load for jacking; jacking to the established operating air gap, and operating pumps in this position for a 30 minute operating test. CONTRACTOR will repair or replace as appropriate any part of Barge or rig damaged during mobilization period and will afford to COMPANY's Representatives full opportunities to examine and inspect any such damaged part and its repairs, or replacement, prior to movement to first location.

It is agreed that in the event the Barge is not in the operating area on or before April 1, 1968 regardless of the cause of delay, COMPANY has the option to rescind this contract by written notice on such date and there shall be no further liability on the part of COMPANY or CONTRACTOR and no payments shall be due CONTRACTOR by COMPANY.

In the event that during the "Basic Term " of this contract or any extension thereof, the Barge becomes

a total loss (which term will include a constructive, averaged and/or compromised total loss) the contract will be considered as terminated, without notice, as from the moment the incident leading to that loss occurred and no payment whatsoever shall become due by COMPANY to CONTRACTOR after that moment, except for work performed under the contract or expenses incurred for the account of the COMPANY as provided by this contract, prior to said incident, and for the unpaid balance of the mobilization fee which, in such event, would become due and payable in 30 days.

11 - COMPENSATION FOR CONTRACTOR

For the work, services and occurrences herein indicated COMPANY shall pay the CONTRACTOR the compensation herein after provided.

All periods of time shall be calculated to the nearest hour.

11.1- Move-in and move-out.

COMPANY will pay to CONTRACTOR the lump sum of U.S.$ 1,410,000.00 for move-in of the rig and equipment from present location to COMPANY's first location which sum covers all costs to COMPANY from the time of start of preparation for tow until the Barge is ready to drill.

The move-in lump sum will be payable $ 594,000.00 on arrival and the balance in 12 equal monthly instalments (without interest) the first of which shall be payable 30 days after arrival and another of which shall be payable on the same day of each successive month, until paid in full. Arrival shall mean the time when CONTRACTOR's equipment is jacked-up and ready to pick-up drive pipe at the location at the first well.

It is understood that said lump sum includes a 95 (ninety five) day period at $ 5,500.00 per day, relative to the time necessary to prepare the Barge for tow, tow to the Operating Area, and prepare the Barge for operating with 435' of leg length.

In case the 95 day period is exceeded, all the

days over the established time will be at CONTRACTOR expense and costs.

However, if such period shall be less than 95 days, the CONTRACTOR will credit COMPANY U.S. $ 5,500.00 for each day saved.

Such credit shall be spread equally over said 12 monthly installments. The 95 (ninety five) day period shall start when the Barge has arrived at the site selected by CONTRACTOR for tow preparation, the hull of the Barge has been raised out of the water and the tugs released. CONTRACTOR will notify COMPANY by telex or cable of the time and day of this event.

There shall be no other mobilization or move-in charge of any kind to be payed by COMPANY.

No move-out lump sum or other move-out charges will be paid by COMPANY to CONTRACTOR at the end of this agreement.

Company shall have no liability to third parties for the acts of CONTRACTOR occurring prior to the beginning of the Basic Term.

11.2 - Operating rate:

COMPANY shall pay CONTRACTOR at the operating rate set forth below for all time, commencing when the CONTRACTOR's equipment is jacked up and ready to pick up drive pipe at the location of the first well to be drilled and ending at the termination of this contract, except such periods of time for which another rate is made applicable by another provision hereof, or except as otherwise especially provided for in this contract.

The operating rate is $ 9,500.00 per day.

14.3- Insurance:

CONTRACTOR agrees to procure and maintain, at its sole cost and expense, the types of insurance with the coverages and limits specified on Schedule "E" attached hereto and incorporated by reference, with an insurance company or companies satisfactory to COMPANY, in each of which policies (other than workmen's compensation policies) COMPANY shall be named as additional insured. Prior to going under tow from the Gulf of Mexico, CONTRACTOR shall furnish COMPANY evidence that such insurance is in force or will be in force prior to the time CONTRACTOR moves on the first well location.

Prior to moving on the first well location CONTRACTOR shall furnish COMPANY with certified copies of each of such insurance policies complete with all endorsements and thereafter furnish copies of all endorsements affecting such policies as soon as received. CONTRACTOR agrees to furnish COMPANY a waiver of the right of subrogation by each of its insurance carriers in favour of COMPANY and its subsidiaries and of any co-Owner specified by COMPANY from time to time with respect to each of CONTRACTOR's policies of insurance. CONTRACTOR shall require that all sub-contractors engaged by CONTRACTOR carry adequate insurance coverages and COMPANY will also require its sub-contractors to do likewise with respect to the CONTRACTOR.

14.4- Reduction:

CONTRACTOR agrees that no provisions of any insurance

policy maintained by it hereunder shall contain any provision reducing the amount collectible thereunder by reason of any covenant on the part of COMPANY herein contained.

14.5- Indemnity and Liability:

a) Anything in any other section hereof to the contrary notwithstanding, the CONTRACTOR shall have sole and exclusive responsibility and liability for damage to or destruction of CONTRACTOR's surface equipment including the Barge, all drilling tools, machinery and appliances which at the time of damage or destruction are not in use in the hole regardless of when or how such damage or destruction occurs except only damage or destruction caused by the gross negligence of COMPANY, its officers agents or employees, and damage caused by mines or war-type explosives remaining in the water from prior armed conflicts.

b) COMPANY shall have sole and exclusive responsibility and liability for damage to or destruction of all facilities, equipment, appliances, materials and supplies owned, rented or leased by COMPANY from any persons other than the CONTRACTOR, regardless of when or how such damage or destruction occurs except only damage or destruction caused by the negligence of CONTRACTOR, its officers, agents, employees or CONTRACTOR's sub-contractors.

c) COMPANY shall not have the right to hold the CONTRACTOR liable for loss or damage to the hole unless such loss or damage is caused by the gross

right (unless the validity or amount of such claims or debts is contested in good faith by CONTRACTOR) but shall be under no obligation to pay such claims or debts out of any money due or payable or to become due or payable to CONTRACTOR by COMPANY.

h) Each party shall have the right to control the conduct of the settlement of any claim to third parties for which such party admits all liability and the conduct of the litigation of any claim by third parties for the whole of which such party is or may be liable hereunder, and the settlement or litigation of any such claim for which liability may be joint shall be jointly controlled or conducted.

14.6- Self insurance;

For all purposes of Section 14.5 above, CONTRACTOR shall be deemed to have procured and maintained (but only if not actually procured or maintained, the decision to procure or maintain being at the option of CONTRACTOR) throughout the life of this contract, at its sole cost and expense, in addition to the types of insurance specified on Schedule "E", hereto attached the following types of insurance, which shall for said purposes be subject to the provisions of this contract:

a) all risks, physical damage, insurance (including damage from explosion, blowout and cratering) covering CONTRACTOR's barge, rig and appurtenant equipment in an amount equal to the replacement value of the rig and such equipment subject to one per cent (1%) deductible to be borne by CONTRACTOR including open

marine cargo insurance and all risk insurance or property owned, rented or leased by COMPANY or for property of others for which COMPANY may be legally liable, while such property is being loaded or unloaded on or from drilling barge, or is aboard or is being transported in said drilling barge with a maximum limit of $ 500,000:00 and with a maximum deductible of $ 25,000.00 to be borne by COMPANY.

b) War risk insurance to the full value of CONTRACTOR's barge, rig and equipment.

Accordingly, CONTRACTOR shall have sole and exclusive responsibility and liability for any losses or damages which would have been covered by the types of insurance mentioned under (a) and (b) to the same extent as if CONTRACTOR had procured and maintained said insurances with the specifications set out above and CONTRACTOR undertakes to protect, indemnify and save harmless COMPANY of and from all claims, demands and causes of action on account of any said losses or damages. In the event the type of insurance specified in (a) above is not in fact provided and maintained then the policy which CONTRACTOR shall be deemed to have procured and maintained shall be deemed to include the clauses, terms and conditions set forth in Schedule "P" attached hereto.

27 - ARBITRATION

Any dispute between the parties touching the construction of this agreement or the rights or liabilities of the parties hereunder, or any matter arising out of the same or connected therewith, shall be settled by arbitration in accordance with rules then obtaining of the International Chamber of Commerce before a Board of three arbitrators. Each of the parties hereto shall be entitled to appoint one arbitrator and the two arbitrators shall agree on a third arbitrator.

In the event agreement upon a third arbitrator cannot be reached, the third arbitrator shall be appointed by the Court of Arbitration of the International Chamber of Commerce.

Unless the parties agree that such arbitration shall be held elsewhere, arbitration shall be held at London (England).

Judgement upon the award rendered may be entered in any Court having jurisdiction where application may be made to such Court for a juridical acceptance of the award and an order of enforcement, as the case may be. Fees of the International Chamber of Commerce arbitrating such dispute shall be borne equally by the disputants.

Any award rendered by or on a majority of the arbitrators shall be binding upon the parties to this agreement.

28 - APPLICABLE LAW

This Agreement shall be interpreted and construed in accordance with the common law of England.

31 - WHOLE AGREEMENT

This agreement supercedes and replaces any oral or written communications heretofore made between the parties relating to the subject matter hereof.

AGIP - S.p.A.

by _____

Direttore Generale
Responsabile Direzione Mineraria

COMPANY

ZAPATA NORTH SEA, INC.

by _____

Vice President

CONTRACTOR

SCHEDULE "E"

INSURANCE

CONTRACTOR agrees to secure and maintain insurance, not less than as hereinbelow specified, covering the operations to be performed under this agreement.

Such insurance shall be carried with insurance companies satisfactory to COMPANY and CONTRACTOR shall furnish COMPANY acceptable evidence that said insurance has been placed in force and effect as provided in Section 14.3 of the contract.

1.A) On U.S. employees, workmen's compensation and employers' liability in accordance with the laws of Italy and the State of Texas or any other state or district of hire with limits of Dollars 500,000 per person and Dollars 1,000,000 per accident, including longshoremen's and harbor workers' compensation as well as Dollars 10,000 repatriation expenses and endemic disease and amendment to coverage B and endorsement-maritime operations to cover Admiralty benefits and damages under Jones Act, provided, however, CONTRACTOR shall not be required to carry any of such insurance in excess of the requirement of applicable law.

1.B) On Italian or any other national employees workmen's compensation and employers' liability insurance to comply with laws and regulations of Italy or other applicable laws or regulations to the limits of Dollars 500,000 each person and Dollars 1,000,000 each accident, provided, however, CONTRACTOR shall not be required to carry any of such insurance in excess of the requirements

of applicable law.

2. - Comprehensive general liability insurance including contractual liability insurance in the limits of Dollars 1,000,000 each person and Dollars 5,000,000 each accident for bodily injury liability and Dollars 5,000,000 each accident for property damage liability.

3. - Comprehensive automobile liability insurance in the limits of Dollars 1,000,000 each person and Dollars 1,000,000 each accident for bodily injury liability and Dollars 1,000,000 each accident for property damage liability.

4.A) All policies shall contain a waiver of subrogation in favor of the COMPANY and all subsidiaries, agents, employees, invitees, servants, subcontractors, insurers and underwriters thereof, as provided in Section 14.3 of the contract.

4.B) All policies shall provide that 30 days notice of cancellation shall be given COMPANY.

4.C) All policies shall be endorsed to provide that there will be no recourse against COMPANY for payment of premium.

4.D) Copies of policies and or certificates of insurance shall be filed with COMPANY as provided in Section 14.3, of the contract.

SCHEDULE F

Deemed Clauses, Terms and Conditions in the Event of Self-Insurance

Le Tourneau Type drilling barge "Chaparral" belonging to CONTRACTOR 24 months from start of Basic Term, and any extension thereof, and in any case for all the duration of this contract.

On drilling barge and /or equipment, including everything connected therewith, and all that shall be present on the barge that is CONTRACTOR'S property, or CONTRACTOR'S, responsibility, with deductible and limits as specified in section 14.6 of the Contract.

The self-insurance is intended valid for all the time operations are carried out on the barge, on site or during movings in the Adriatic Sea area.

All operations and movings concerning the barge will be directed by the CONTRACTOR in accordance to CONTRACTOR'S regulations and compatible with COMPANY needs.

Problems regarding location will be a dealt with by COMPANY according to the normal customs used for drilling previous COMPANY wells in the Adriatic Sea.

OTHER DEEMED CLAUSES AND CONDITIONS

1) Assured : CONTRACTOR

2) Loss Payee: CONTRACTOR

3) Loss, if any, payable to CONTRACTOR as above

4) Self-insurance on barge rig and equipment is valid for all the period foreseen in this Contract

5) Property insured hereunder : Le Tourneau type drilling barge Chaparral"

(a). The Hull and Machinery of the drilling barge including all her equipment, tools, machinery, caissons, lifting jacks, materials, supplies, appurtenances, drilling rigs and equipment, derricks, drill stem, casing and tubing while aboard the said drilling barge and/or barges and/or vessels moored alongside or in the vicinity thereof and used in connection therewith (but not such barges and/or vessels themselves) and including drill stem in the well being drilled, the property of the assured or for which the assured may be liable under contract or otherwise.

(b). This insurance also covers property insured herein (as described in Paragraph 5 (a) above, when separated from the drilling barge insured hereunder, including property intended to be used aboard or in connection with said drilling barge, wherever located within the navigation limits set forth herein.

6) NAVIGATION LIMITS : Warranted confined to the use and navigation in the Adriatic Sea.

Also to cover inport,while going on and off and while in docks and graving docks and/or wharves, ways, gridirons and pontoons.

Privilegeis granted to be towed and to accept towage contracts

releasing the towing vessels (and/or its owner and/or operator) of liability for loss of or damage to the property insured hereunder and the assured's right of recevery under this certificate or policy shall not be prejudiced by the acceptance of such towage or towage contract and provided such towage does not extend to waters other than those defined by the warranties contained herein.

7) This certificate or policy, subject to its terms and conditions, insures against all risks or direct physical loss or damage to the property insured.

Blowout: The term "Blowout" shall mean a sudden, accidental, uncontrolled and continuous expulsion from the well and above the surface of the ground of the drilling fluid in an oil or gas well, followed by continuous and uncontrolled flow from the well and above the surface of the ground of oil gas or water due to encountering subterranean pressure during the drilling or reworking of such well.

Cratering: The term "Crater" shall be defined as a basin like depression in the earth's surface surronding a well caused by the erosive and eruptive action of oil, gas or water flowing without restriction.

Strikes, riots and civil commotions: Defined as damage to or destruction of the property insured directly caused by strikers, locked out workmen or persons taking part in labour disturbances or riots or civil commotions but excluding civil war, revolution, rebellion or insurrection or civil strife arising therefrom and warranted free from any claim for delay, detention or loss of use.

8) Notwithstanding all stated above, the only risks that are not deemed covered by Contractors self-insurance are the following:

(a). Loss or damage to drill stem located underground or under water unless resulting from fire, lightning, flood, rising waters, tidal wave, ice, explosion above the surface of the

ground, tornado, windstorm, wave action, stress of weather, cyclone, hurricane, earthquake, blowout and/or cratering or collision nor loss of drill stem left in the well and through which an oil and/or gas well is completed.

(b). Drilling mud, cement, chemicals and fuel actually in use, casing and tubing in the well.

(c). Liabilities to third parties not otherwise covered hereunder.

9) BLOWOUT PREVENTER WARRANTY CLAUSE: The assured warrants and agrees that blowout preventers of Standard make will be used, same to be installed and tested in accordance with the usual practice.

10) It is further agreed that if the barge insured hereunder should come into collision with any vessel or object and the assured shall, as a consequence of such collision, become legally liable to pay, and shall pay, by way of damages to any other person or persons any sum or sums in respect of such collision, such sum so paid shall constitute a loss under this insurance to be borne by the Underwriters subject to the terms and conditions of this certificate or policy and any or all endorsements thereof; but this insurance shall in no case cover any claim which the assured may become liable to pay or shall pay for loss of life or for personal injury. In cases in which, with the consent of the Underwriters, the liability of the drilling barge or of the assured for such collision damage shall have been contested, or proceedings shall have been taken to limit liability, the costs and expenses of such contest or proceedings shall be part of such loss.

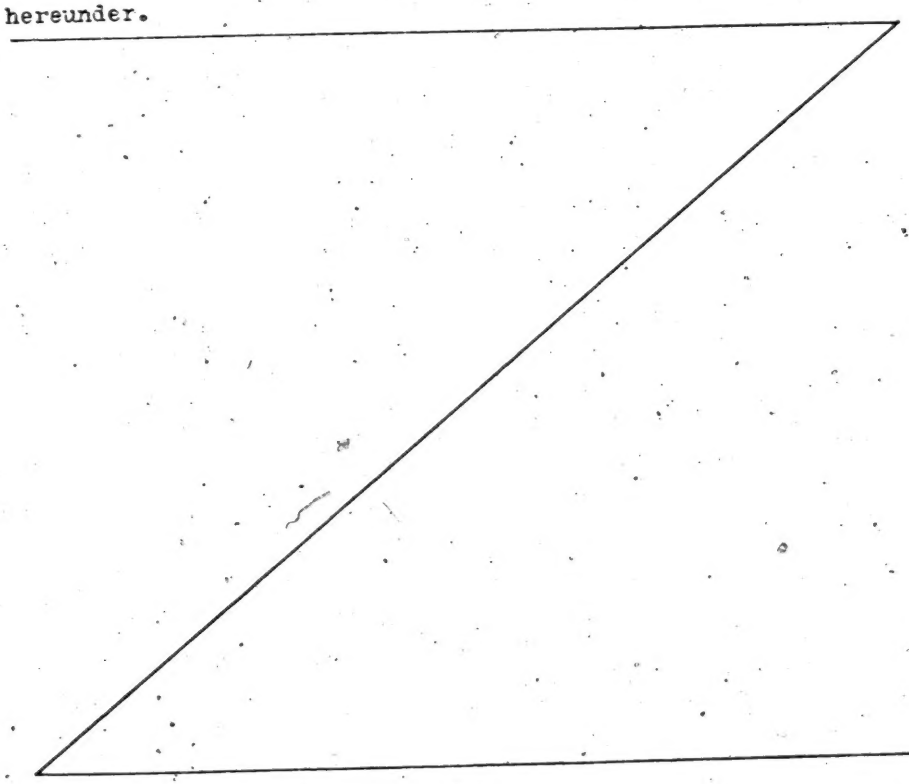
11) No claim shall in any case be allowed in respect of scraping or painting the bottom of the hull of the drilling barge, in regards to the COMPANY.

./.

12) In case the barge is brought to a port, agreed upon by the COMPANY and the CONTRACTOR, the insurance validity shall continue and included in the rates agreed upon for Stand by rate with reduced crew in port.

In any case the Contractor will be responsible for damage or loss of the barge, for any happening made in relation to the self-insurance clauses and furthermore will be responsible for the consequences to the barge, deriving from lack of watch, maintenance, safety rules, etc.

13) COMPANY and its subsidiaries and any Co-Owners specified by COMPANY from time to time shall be additional insured parties hereunder.



IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 27,497

In the Matter of the Complaint of
Unterweser Reederei GMBH, for Exoneration from or
Limitation of Liability as Owner of the M/S BREMEN

UNTERWESER REEDEREI, GMBH,
Plaintiff-Appellant

v.

ZAPATA OFF-SHORE COMPANY
Claimant-Appellee

AFFIDAVIT OF E. F. SHIELS, EXECUTIVE VICE PRESIDENT OF ZAPATA NORNESS, INCORPORATED

THE STATE OF TEXAS I

COUNTY OF HARRIS I

BEFORE ME, the undersigned authority, personally appeared E. F. Shiels, who, being by me duly sworn, deposes and says:

My name is E. F. Shiels. I reside in Houston, Texas. I am executive vice president of Zapata Norness, Incorporated, a Delaware corporation headquartered in Houston, Texas, the name of which, prior to November 25, 1968, was Zapata Off-Shore Company.

ZAPATA OWNED THE CHAPARRAL

In the last half of 1967 and all of 1968 I was senior vice president of Zapata. Zapata owned then, and still owns, the Drill Rig CHAPARRAL. As owner of the CHAPARRAL, Zapata has filed its claim against Unterweser for $3,500,000 for the damages it sustained as a result of the casualty of January 9, 1968.

ZAPATA WAS SELF INSURED

At the time of this casualty Zapata Off-Shore Company was a self-insurer. There was neither hull and machinery insurance, protection and indemnity insurance nor liability insurance on the CHAPARRAL. Zapata Off-Shore Company has incurred repair and other expenses attributable to this casualty in an amount in excess of $3,000,000, exclusive of loss of earnings, which Zapata Off-Shore Company has paid with its own funds. Zapata has not been reimbursed for its outlays of money and has no claim pending against anyone for its losses, other than its claim against Unterweser Reederei GMBH and the Tug BREMEN.

Zapata Off-Shore Company alone will bear the expenses of defending the claim asserted against it by Unterweser Reederei GMBH, and will respond to any judgment rendered against it arising out of this litigation.

THE CHAPARRAL HAD NOT BEEN CHARTERED

Under date of September 20, 1967, Zapata North Sea, Inc., a wholly owned subsidiary of Zapata Off-Shore Company, entered into a drilling contract with AGIP S.p.A, an Italian corporation, with respect to drilling operations in the Adriatic Sea. I executed this contract in my capacity as a vice president of Zapata North Sea, Inc. Under the drilling contract, Zapata North Sea, Inc., as drilling contractor, was obligated to furnish a drill barge such as the CHAPARRAL. The basic term of the drilling contract was for two years, commencing the moment the contractor's equipment moved on the first location in the Adriatic Sea. In the event the drill barge was not in the operating area on or before April 1, 1968, AGIP had the option to rescind the contract by written notice with no further liability on the part of the contractor or AGIP. The contract pro-

vided that if AGIP rescinded, no payment would be due Zapata North Sea by AGIP.

The CHAPARRAL, while in tow of the tug BREMEN, lost the major portions of its three legs in the Gulf of Mexico on January 9, 1968, and was thereby disabled from service until June 30, 1968. As a consequence, AGIP gave written notice of recission and cancelled the drilling contract it had with Zapata North Sea, Inc.

Although it was contemplated that Zapata Off-Shore Company would bareboat charter the CHAPARRAL to Zapata North Sea, Inc. prior to the CHAPARRAL's commencing its work under the AGIP contract in the Adriatic Sea, no bareboat charter party contract was made by Zapata Off-Shore Company and Zapata North Sea, Inc. because of the recission of the AGIP contract.

Zapata North Sea, Inc. has not made any claim against anyone for the losses and damages resulting from the casualty of January 9, 1968.

THE RIDING CREW

In addition to the Unterweser Reederei riding crew, there were on board the CHAPARRAL on the voyage in question the following:

1. Oscar Willard, designated as Master of the CHAPARRAL for the voyage in question - employed by Zapata Off-Shore Company on that occasion and regularly as a Rig Mover and Maintenance Foreman. He is an American citizen and permanent resident of the United States.

2. Earl Richie (welder) - employed by Zapata Off-Shore Company. He is an American citizen and permanent resident of the United States.

3. Wilton Johnson (toolpusher), Nolan R. Gamble (motorman), William Oscar Paul (toolpusher-driller) and Kenneth Price (motorman) - under employment by Zapata North Sea, Inc. to work on board the CHAPARRAL while under contract to AGIP. These five men were regular employees of Zapata Off-Shore Company immediately prior to the voyage in question and were American citizens with permanent residences in the United States.

4. L. J. Fruge (cook) - employed by the Louisiana catering firm of Statton and Statton. He is an American citizen and permanently resides in the United States.

This affidavit is based upon my personal knowledge and the business records of Zapata Off-Shore Company (now known as Zapata Norness, Incorporated) and Zapata North Sea, Inc.

E. F. Shiels

SWORN TO AND SUBSCRIBED BEFORE ME this 30th day of September, 1970.

Joyce O'Neill, Notary Public in and for Harris County, Texas
(My commission expires 6-1-71)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 27,497

In the Matter of the Complaint of
Unterweser Reederei GMBH, for Exoneration from or
Limitation of Liability as Owner of the M/S BREMEN

UNTERWESER REEDEREI, GmbH,
Plaintiff-Appellant

V.

ZAPATA OFF-SHORE COMPANY
Claimant-Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

AFFIDAVIT OF
FERGUS DINGWALL BATESON

BEFORE ME, the undersigned authority, personally appeared Fergus Dingwall Bateson, who, being by me first duly sworn, deposes and says:

1. My name is Fergus Dingwall Bateson. I am a partner in the law firm of Thomas Cooper & Co., Solicitors of Baltic House, 27 Leadenhall Street, London, England. I hold a Degree in Litterae Humaniores at the University of Oxford. My legal education consisted of two course of study at the School of Law of the Law Society, culminating in my passing the final examinations of the Law Society with Honours. The Law Society is the only body authorised to set qualifying examinations for Solicitors in England. I was admitted to practise as a Solicitor in the courts of England on 2nd July 1956, and am duly licensed to practise

as such at this time. I am a specialist in the practice of English Maritime and Admiralty Law, and have practiced in this field of law for about fourteen years past.

2. I have heretofore executed on April 10, 1968, an affidavit with respect to English law at the request of Mr. James K. Nance, partner in the law firm of Baker, Botts, Shepherd & Coates, Houston, Texas, which, I am informed, is a part of the record in the above proceeding. I have been further requested by Mr. Nance to submit an opinion with respect to the English limitation of liability statutes.

3. If the facts alleged in the Claim and Answer filed by Zapata Off-Shore Company in the limitation proceeding commenced by Unterweser Reederei GmbH in the United States District Court at Tampa, Florida, were alleged either by way of Original Action or by way of Counterclaim by Zapata Off-Shore Company against Unterweser Reederei GmbH, and if such Original Action or Counterclaim were to be submitted to the High Court of Justice in England to be decided in accordance with English law, Unterweser Reederei GmbH would be able to claim the right to limit its liability, either by application in a separate Action for a Limitation Decree of the Court or by way of Defence to a Counterclaim of Zapata Off-Shore Company in the proceedings brought by Unterweser Reederei GmbH against Zapata Off-Shore Company in the High Court of Justice, London, England.

4. The right of Unterweser Reederei GmbH to limit its liability in respect of any damages awarded against it in an original Action or in the Counterclaim of Zapata Off-Shore Company arises by Statute, namely, the Merchant Shipping Act, 1894 as varied by the Merchant Shipping Act 1906 and the Merchant Shipping Act (Liability of Shipowners & Others) 1958.

Copies of Section 503 of the Merchant Shipping Act, 1894, Section 69 of the Merchant Shipping Act 1906, and Section 1 of the Merchant Shipping (Liability of Shipowners & Others) Act. 1958, are exhibited hereto and marked ("Exhibit 1"). The relevant Statutes apply to foreign ships, as well as British ships, wherever the relevant incident occurred, to the exclusion of any foreign law.

5. As a result of the recent decision of the Court of Appeal of the High Court of Justice in England in N.V. Bureau Wijsmuller v The "Tojo Maru" (Owners) (1969 2 Lloyds List page 193), the right of Unterweser Reederei GmbH to limit its liability would depend upon whether the loss or damage referred to in the original action or Counterclaim of Zapata Off-Shore Company was caused by the act or omission of any person (whether on board the m.s. "BREMEN" or not) in the navigation or management of the m.s. "BREMEN". From the particulars contained in the Claim and Answer of Zapata Off-Shore Company filed in Unterweser's limitation action in the U.S. District Court in Tampa, Florida, it appears that the alleged faults of those on board the m.s. "BREMEN" were in the navigation or management of that vessel, so that, accordingly, Unterweser Reederei GmbH would be entitled to limit its liability in accordance with English law to a sum based upon the registered tonnage (i.e. net tonnage) of the m.s. "BREMEN", with the addition of any engine room space deducted for the purpose of ascertaining that tonnage, (hereinafter called "the limitation tonnage").

6. The precise figure of the limitation tonnage would depend upon whether the vessel had been measured in accordance with the Second Schedule to the Merchant Shipping Act, 1894 which sets out the measurement of tonnage for British ships. Failing measurement in accordance with this Schedule, it would

be possible for a Court in England to direct that the Certificate of the Surveyor General of Ships in the United Kingdom of the tonnage of the ship should be issued. By Section 84 of the Merchant Shipping Act 1894, the tonnage of a foreign ship as stated in her national certificate of registry may by Order in Council be accepted as equivalent to tonnage denoted in the certificate of registry of a British ship. An Order in Council under this Section in respect of ships registered in Germany was made dated 23rd July 1889 which Order in Council is still in force.

7. Section 503 (1) (ii) of the Merchant Shipping Act,1894 provides that in respect of such loss the limit of liability shall not exceed an amount equivalent to 1,000 gold francs for each ton of the limitation tonnage. Section 1 (3) of the Merchant Shipping (Liability of Shipowners and Others) Act, 1958 provides that the appropriate Government Officer may from time to time by Order made by Statutory Instrument specify the amount which for the purposes of this section is to be taken as equivalent to 1,000 gold francs. There is exhibited hereto and marked("Exhibit 2") a copy of the Statutory Instrument 1967 No. 1725 the Merchant Shipping (Limitation of Liability) Sterling Equivalent Order 1967 providing that the Sterling equivalent of 1,000 gold francs is to be the sum of £27.12s.9½d. Accordingly, the amount to which the Owners of the m.s. "BREMEN" would be entitled to limit their liability is the sum of £27.12s. 9½d. for each ton of the vessel's tonnage calculated in accordance with British law or certified by the Surveyor General of Ships in the United Kingdom.

8. It is stated in the Complaint of Unterweser Reederei GmbH filed in its limitation proceeding in the United States District Court in Tampa, Florida, that the Tug m/s "BREMEN"

GREAT BRITAIN AND NORTHERN IRELAND
LONDON, ENGLAND
EMBASSY OF THE UNITED STATES OF AMERICA

I, Frank J. Barrett Vice Consul of the United States of America residing at London, England, duly commissioned and qualified, do hereby certify that

ANT. J. BURGESS

whose signature and official seal are respectively subscribed and affixed to the annexed certificate, was on the date of the signing thereof a Notary Public at London, England, duly authorized to perform notarial acts, duly appointed and qualified, to whose official acts faith and credit are due; that I have compared the signature of said

ANT. J. BURGESS

on the annexed certificate with a specimen of his signature filed in this Embassy; that I believe his signature to be genuine; that I have compared the impression of the seal affixed thereto with a specimen thereof filed in this Embassy, and that I believe the impression of the seal upon the said original annexed certificate to be genuine.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of the Consular Service of the United States of America at London, England, this fourteenth day of October in the year of Our Lord one thousand nine hundred and ~~sixty-nine~~ Seventy.

Frank J. Barrett
Vice Consul of the United States of America at London, England.

Service Receipt No. A 051613

Tariff Item No. 48

Fee: $2.50= £1. 1s. 0d.

~~No fee prescribed~~

LND/114
Jan. 69

is of German registry of 1200 gross tons. It will be seen that the limitation tonnage of the m/s "BREMEN" cannot exceed her gross tonnage and would probably be less. If, however, the limitation tonnage of the Tug m/s "BREMEN" is calculated in accordance with British law (above referred to in paragraphs 6 and 7) as 1200 tons, it appears that the limitation of liability of Unterweser Reederei GmbH, in accordance with English law, would not exceed 33,600 pounds sterling. The current rate of exchange from English pounds sterling to United States dollars is 2.385 dollars for each pound sterling, so that accordingly the amount for which Unterweser Reederei GmbH could be liable would not exceed the sum of 80,136 United States dollars.

SWORN by the above named)
FERGUS DINGWALL BATESON)
on the 13th day of)
October 1970 at 27,)
Leadenhall Street)
in the City of London)

F D Bateson

Before me

A. J. Burgess

NOTARY PUBLIC
LONDON, ENGLAND
(A.J.BURGESS)

This is the Exhibit marked "1" referred to in the Affidavit of FERGUS DINGWALL BATESON sworn the 13th day of October, 1970

Before me, A. J. Burgess
NOTARY PUBLIC, LONDON, ENGLAND
(A. J. BURGESS)

("EXHIBIT 1")

(b) in payment of the amount claimed by the shipowner as due for freight or other charges in respect of the said goods;

and the surplus, if any, shall be paid to the owner of the goods.

Warehouseman's rent and expenses

499. Whenever any goods are placed in the custody of a wharfinger or warehouseman, under the authority of this Part of this Act, the warfinger or warehouseman shall be entitled to rent in respect of the same; and shall also have power, at the expense of the owner of the goods, to do all such reasonable acts as in the judgment of the warfinger or warehouseman are necessary for the proper custody and preservation of the goods, and shall have a lien on the goods for the rent and expenses.

Warehousemen's protection.

500. Nothing in this Part of this Act shall compel any wharfinger or warehouseman to take charge of any goods which he would not have been liable to take charge of if this Act had not been passed; nor shall he be bound to see to the validity of any lien claimed by any shipowner under this Part of this Act.

Savings for powers under local Acts.

501. Nothing in this Part of this Act shall take away or abridge any powers given by any local Act to any harbour authority, body corporate, or persons, whereby they are enabled to expedite the discharge of ships or the landing or delivery of goods; nor shall anything in this Part of this Act take away or diminish any rights or remedies given to any shipowner or wharfinger or warehouseman by any local Act.

PART VIII.

LIABILITY OF SHIPOWNERS.

Limitation of shipowner's liability in certain cases of loss of, or damage to, goods.

502. The owner of a British sea-going ship, or any share therein, shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity in the following cases; namely, —

(i.) Where any goods, merchandise, or other things whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board the ship; or

(ii.) Where any gold, silver, diamonds, watches, jewels, or precious stones taken in or put on board his ship, the true nature and value of which have not at the time of shipment been declared by the owner or shipper thereof to the owner or master of the ship in the bills of lading or otherwise in writing, are lost or damaged by reason of any robbery, embezzlement, making away with, or secreting thereof.

Limitation of owner's liability in certain cases of loss of life, injury, or damage.

503.—(1.) The owners of a ship, British or foreign, shall not, where all or any of the following occurrences take place without their actual fault or privity; (that is to say,)

(*a.*) Where any loss of life or personal injury is caused to any person being carried in the ship;

(*b.*) Where any damage or loss is caused to any goods, merchandise, or other things whatsoever on board the ship;

(*c.*) Where any loss of life or personal injury is caused to any person carried in any other vessel by reason of the improper navigation of the ship;

(*d.*) Where any loss or damage is caused to any other vessel or to any goods, merchandise, or other things whatsoever on board any other vessel, by reason of the improper navigation of the ship;

be liable to damages beyond the following amounts; (that is to say,)

(i.) In respect of loss of life or personal injury, either alone or together with loss of or damage to vessels, goods, merchandise, or other things, an aggregate amount not exceeding fifteen pounds for each ton of their ship's tonnage; and

(ii.) In respect of loss of, or damage to, vessels, goods, merchandise, or other things, whether there be in addition loss of life or personal injury or not, an aggregate amount not exceeding eight pounds for each ton of their ship's tonnage.

(2.) For the purposes of this section —

(*a.*) The tonnage of a steam ship shall be her gross tonnage without deduction on account of engine room; and the tonnage of a sailing ship shall be her registered tonnage:

Provided that there shall not be included in such tonnage any space occupied by seamen or apprentices and appropriated to their use which is certified under the regulations scheduled to this Act with regard thereto.

(*b.*) Where a foreign ship has been or can be measured according to British law, her tonnage, as ascertained by that measurement shall, for the purpose of this section, be deemed to be her tonnage.

(*c.*) Where a foreign ship has not been and cannot be measured according to British law, the surveyor-general of ships in the United Kingdom, or the chief measuring officer of any British possession abroad, shall, on receiving from or by the direction of the court hearing the case, in which the tonnage of the ship is in question, such evidence concerning the dimensions of the ship as it may be practicable to furnish, give a certificate under his hand stating what would in his opinion have been the tonnage of the ship if she had been duly measured according to British law, and the tonnage so stated in that certificate shall, for the purposes of this section, be deemed to be the tonnage of the ship.

(3.) The owner of every sea-going ship or share therein shall be liable in respect of every such loss of life, personal injury, loss of or damage to vessels, goods, merchandise, or things as aforesaid arising on distinct occasions to the same extent as if no other loss, injury, or damage had arisen.

Power of courts to consolidate claims against owners, & c.

504. Where any liability is alleged to have been incurred by the owner of a British or foreign ship in respect of loss of life, personal injury, or loss of or damage to vessels or goods, and several claims are made or apprehended in respect of that liability, then, the owner may apply in England and Ireland to the High Court, or in Scotland to the Court of Session, or in a British possession to

Power of naval court to send a person sentenced to imprisonment home to undergo sentence.

67.—(1) The powers of a naval court under section four hundred and eighty-three of the principal Act (which deals with those powers) shall include a power to send an offender sentenced by the Court to imprisonment either to the United Kingdom or to any British possession to which his Majesty by Order in Council has applied this section, as appears to them most convenient for the purpose of being imprisoned, and the court may take the same steps, and for that purpose shall have the same powers, as respects the orders which may be given to masters of ships as a consular officer has for the purpose of sending an offender for trial under section six hundred and eighty-nine of the principal Act, and subsections (2), (4), and (5) of that section shall apply with the necessary modification.

(2) Any master of a ship to whose charge an offender is committed under this section shall, on his ship's arrival in the United Kingdom or in a British Possession, as the case may be, give the offender into the custody of some police officer or constable, and the offender shall be dealt with as if he had been convicted and sentenced to imprisonment by a court of competent jurisdiction in the United Kingdom or in the British possession, as the case may be.

(3) His Majesty may by Order in Council apply this section to any British possession the Legislature of which consents to that application.

Appeal from naval courts.

68.—(1) Any person aggrieved by an order of a naval court ordering the forfeiture of wages, or by a decision of a naval court of a question as to wages, fines, or forfeitures, may appeal to the High Court in such manner and subject to such conditions and provisions as may be provided by rules of court, and on any such appeal the High Court may confirm, quash, or vary the order or decision appealed against as they think just.

(2) Subsection (2) of section four hundred and eighty-three of the principal Act shall not have effect with respect to any order of a naval court which is quashed on an appeal under this section, and, where an order of a naval court is varied on appeal, shall apply as if the order as so varied were the order originally made by the naval court.

Calculation of tonnage of steamship for the purpose of limitation of liability.

69. For the purpose of the limitation under the Merchant Shipping Acts of the liability of owners of ships, docks, or canals, and of harbour authorities and conservancy authorities, the tonnage of a steamship shall be her registered tonnage, with the addition of any engine-room space deducted for the purpose of ascertaining that tonnage, and the words "registered tonnage "with the addition of any engine-room space deducted for the "purpose of ascertaining that tonnage" shall accordingly be substituted in paragraph (*a*) of subsection (2) of section five hundred, and three of the principal Act for "gross tonnage without diduction on account of engine-room."

CHAPTER 62

Merchant Shipping (Liability of Shipowners and Others) Act, 1958

ARRANGEMENT OF SECTIONS

Section
1. Increase in liability of shipowners and others.
2. Amendments as to nature of liability limited by Merchant Shipping Act, 1894, s. 503.
3. Extension to other persons of provisions applying to shipowners.
4. Unregistered ships and ships in course of completion or construction.
5. Release of ship, etc.
6. Restriction on enforcement after giving of security.
7. Distribution of limitation fund.
8. Minor and consequential amendments and repeals.
9. Saving for occurrences taking place before commencement.
10. Provisions as to Northern Ireland.
11. Application to British possessions, etc.
12. Construction, short title and citation.
SCHEDULE—Enactments repealed.

An Act to amend Part VIII of the Merchant Shipping Act, 1894, and section two of the Merchant Shipping (Liability of Shipowners and others) Act, 1900; and for purposes connected therewith.

[1st August, 1958]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Increase in liability of shipowners and others. 57 & 58 Vict. c. 600. 63 & 64 Vict. c. 322.

1.—(1) In ascertaining the limits set to the liability of any persons by section five hundred and three of the Merchant Shipping Act, 1894, or section two of the Merchant Shipping (Liability of Shipowners and others) Act, 1900, there shall be substituted—

(*a*) for the amount of fifteen pounds mentioned in the said section five hundred and three, an amount equivalent to three thousand one hundred gold francs;

(*b*) for each of the amounts of eight pounds mentioned in the said sections, an amount equivalent to one thousand gold francs;

and the number by which the amount substituted by paragraph (a) of this subsection is to be multiplied shall be three hundred in any case where the tonnage concerned is less than three hundred tons.

(2) For the purposes of this section a gold franc shall be taken to be a unit consisting of sixty-five and a half milligrams of gold of millesimal fineness nine hundred.

(3) The Minister of Transport and Civil Aviation may from time to time by order made by statutory instrument specify the amounts which for the purposes of this section are to be taken as equivalent to three thousand one hundred and one thousand gold francs respectively.

(4) Where money has been paid into court (or, in Scotland, consigned in court) in respect of any liability to which a limit is set as aforesaid, the ascertainment of that limit shall not be affected by a subsequent variation of the amounts specified under subsection (3) of this section unless the amount paid or consigned was less than that limit a ascertained in accordance with the order then in force under that subsection.

Amendments as to nature of liability limited by Merchant Shipping Act, 1894 s. 503.

2.—(1) In subsection (1) of section five hundred and three of the Merchant Shipping Act, 1894, the following paragraphs shall be substituted for paragraphs (*c*) and (*d*)—

"(*c*) where any loss of life or personal injury is caused to any person not carried in the ship through the act or omission of any person (whether on board the ship or not) in the navigation or management of the ship or in the loading, carriage or discharge of its cargo or in the embarkation, carriage or disembarkation of its passengers, or through any other act or omission of any person on board the ship;

(*d*) where any loss or damage is caused to any property (other than any property mentioned in paragraph (*b*) of this subsection) or any rights are infringed through the act or omission of any person (whether on board the ship or not) in the navigation or management of its cargo or in the embarkation, carriage or disembarkation of its passengers, or through any other act or omission of any person on board the ship;"

and for the words "loss of or damage to vessels, goods, merchandise or other things", both where they occur in paragraph (i) and where they occur in paragraph (ii), there shall be substituted the words "such loss, damage or infringement as is mentioned in paragraphs (*b*) and (*d*) of this subsection".

(2) For the purpose of the said subsection (1), where any obligation or liability arises—

(*a*) in connection with the raising, removal or destruction of any ship which is sunk, stranded or abandoned or of anything on board such a ship, or

(*b*) in respect of any damage (however caused) to harbour works, basins or navigable waterways.

the occurrence giving rise to the obligation or liability shall be treated as one of the occurrences mentioned in paragraphs (*b*)

This is the Exhibit marked "2" referred to in the Affidavit of FERGUS DINGWALL BATESON sworn the 13th day of October, 1970.
Before me
A. J. Burgess
NOTARY PUBLIC, LONDON, ENGLAND
(A. J. BURGESS)

("EXHIBIT 2")

STATUTORY INSTRUMENTS

1967 No. 1725

MERCHANT SHIPPING

The Merchant Shipping (Limitation of Liability) (Sterling Equivalents) Order 1967

Made - - - - 22*nd November* 1967

Coming into Operation 24*th November* 1967

The Board of Trade, in exercise of their powers under section 1(3) of the Merchant Shipping (Liability of Shipowners and Others) Act 1958(a), as having effect by virtue of the Transfer of Functions (Shipping and Construction of Ships) Order 1965(b) and of all other powers enabling them in that behalf hereby order as follows: —

1. This Order may be cited as the Merchant Shipping (Limitation of Liability) (Sterling Equivalents) Order 1967, and shall come into operation on the 24th November 1967.

2. Eighty five pounds thirteen shillings seven pence and thirteen-sixteenths of a penny, and twenty seven pounds twelve shillings and ninepense halfpenny are hereby specified as the amounts which for the purposes of the aforesaid section 1 are to be taken as equivalent to three thousand one hundred and one thousand gold francs respectively.

3. This Order supersedes the Merchant Shipping (Limitation of Liability) (Sterling Equivalents) Order 1958(c).

R. C. Bryant,
An Under-Secretary of the
Board of Trade.

22nd November 1967.

EXPLANATORY NOTE

(This Note is not part of the Order.)

Under section 503 of the Merchant Shipping Act 1894 (c. 60) and section 2 of the Merchant Shipping (Liability of Shipowners and Others) Act 1900 (? ??) as amended by the Merchant Shipping (Liability of Shipowners and Owners) Act 1958, shipowners, harbour authorities and others may limit their liability at amounts expressed in gold francs. This Order supersedes a similar Order made in 1958 and specifies the present sterling equivalent of those amounts.

(a) 1958 c. 62. (b) S.I. 1965/145 (1965 I, p. 438).
(c) S.I. 1958/1287 (1958 I, p. 1502).

Printed and Published by Her Majesty's Stationery Office: 1967
Printed in England at St. Stephen's Parliamentary Press
3d. net

(352705) (R92) X18 11/67

SUPR

SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
1 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM - 1972

No. _____

In the Matter of the Complaint of
UNTERWESER REEDEREI, GMBH,
for Exoneration from or Limitation
of Liability as Owner of the M/S BREMEN

UNTERWESER REEDEREI, GMBH
Petitioner,

v.

ZAPATA OFFSHORE COMPANY,
Respondent.

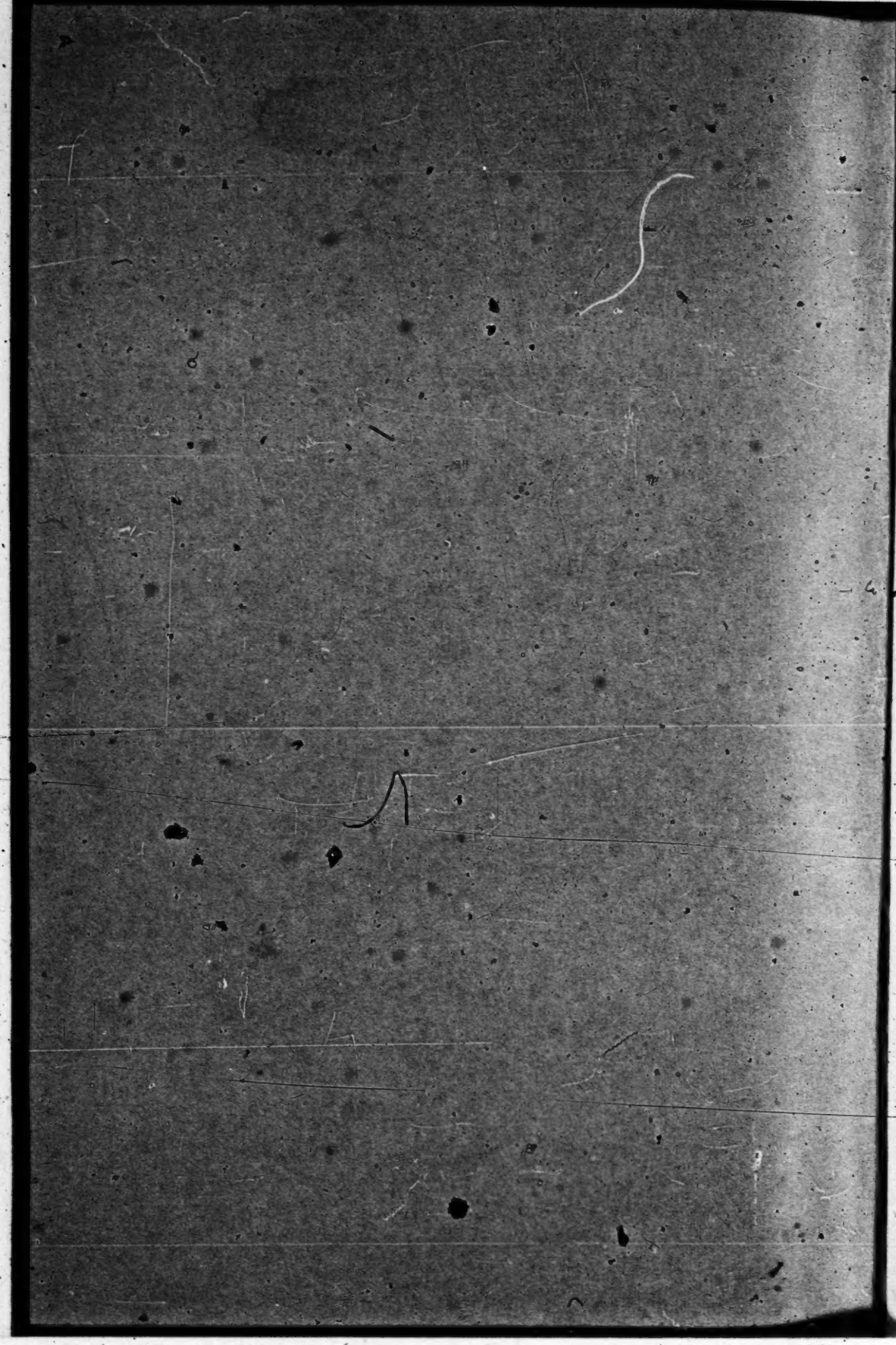
PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

DAVID C. G. KERR
of MACFARLANE, FERGUSON,
ALLISON & KELLY
Post Office Box 1531
Tampa, Florida 33601
Counsel for Petitioner

JACK C. RINARD
of MACFARLANE, FERGUSON,
ALLISON & KELLY
Post Office Box 1531
Tampa, Florida 33601
Of Counsel for Petitioner

WARREN M. FARIS and
J. Y. GILMORE, JR.
of FARIS, ELLIS, CUTRONE,
GILMORE &
LAUTENSCHLAEGER
1207 Whitney Building
New Orleans, Louisiana 70130
Of Counsel for Petitioner

FREE PRESS PUB. CO., INC., TAMPA, FLORIDA



INDEX

	Page
Decision to be Reviewed	1
Jurisdiction	2
Questions Presented	2, 3
Statutory Provisions	3
Statement of the Case and Facts	3
District Court Jurisdiction	3
The Towage Contract	5
The Collapse of the Chaparral	6
The Initial Proceeding	7
London Action	8
Limitation Proceeding	8
The Opinion of the Court of Appeals	10
Reasons for Granting the Writ	12
1. The Fifth Circuit's Decision Conflicts With This Court's Decision In *National Equipment Rental v. Szukhent*, 375 U.S. 311, 84 S.Ct. 411, 11 L.Ed. 2d 354 (1964) And With Decisions Of The United States Courts Of Appeal For The Second And Third Circuits	12
2. In The Interest Of International Trade, Commerce And Comity, The Supreme Court Should Determine The Conditions Under Which Forum Provisions In International Contracts Will Be Honored, If At All, In United States Courts	18
Conclusion	23

CITATIONS

CASES — Page

Aamco Automatic Transmissions, Inc. v. Hagenbarth,
296 F.Supp. 1142 (E.D.Pa. 1968) 14

Aetna Insurance Company vs United Fruit Company,
304 U.S. 430 (1938) 19

Bisso v. Inland Waterways Corporation,
349 U.S. 85 (1955) 16

Canadian Filters (Harwich) Limited v. Lear-Seigler, Inc.,
412 F.2d 577 (1st Cir. 1969) 19, 21

Carbon Black Export, Inc. v. The S. S. Monrosa,
254 F.2d 297 (5th Cir. 1958) 10, 12

Central Contracting Co. v. Maryland Casualty Co.,
367 F.2d 341 (1966) 15, 17

Geiger v. Keelani,
270 F.Supp. 461 (1947) 14

Gulf Oil Corporation v. Gilbert,
330 U.S. 501 (1947) 17

Hawaii Credit Card Corp. v. Continental Credit Card Corp.,
290 F.Supp 848 (D. Hawaii 1968) 14

Indussa Corp. v. S. S. Ranborg,
377 F.Supp. 1132 (1967) 14

Matthiessen v. National Trailer Convoy, Inc.,
294 F.Supp. 1132 (D. Minn. 1968) 14

National Equipment Rental Ltd. v. Centra Cast Co.,
270 F.Supp. 999 (E.D.N.Y. 1966) 14

National Equipment Rental Ltd. v. Reagin,
338 F.2d 759 (2d Cir. 1964) 15

National Equipment Rental Ltd. v. Saunders,
271 F.Supp. 756 (E.D.N.Y. 1967) 14

CITATIONS—Continued

National Equipment Rental v. Szukhent,
375 U.S. 311 (1964) 12, 13

San Juan Hotel Corporation v. Lefkowitz,
277 F.Supp. 28 (D. Puerto Rico 1967) 13

Seaboard Coastline Railroad Company v. Tennessee Corporation,
421 F.2d 970 (5th Cir. 1970) 16

Standard Oil Company v. United States of America,
340 U.S. 54 (1950) 19

Wm. H. Muller & Co. v. Swedish American Line, Ltd.,
224 F.2d 806 (1955) 14

United States v. Roscoe-Ajax Construction Co.,
246 F.Supp 439 (N.D.Cal. 1965) 14

Text

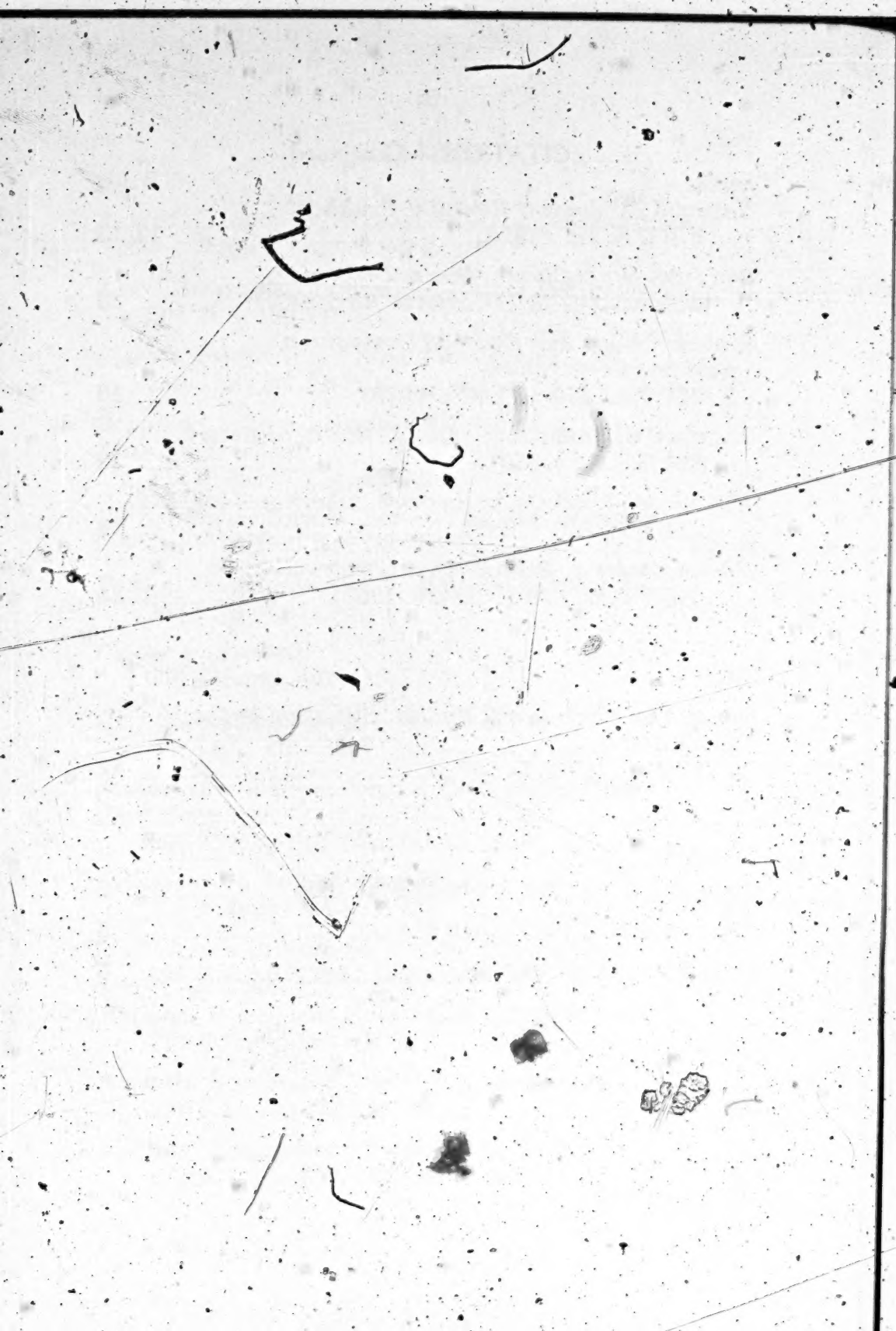
Reese, *The Contractual Forum: Situation in the United States*
13 Am.J. Com. L. 187 12

Statutes

Title 28 USC, § 1254 c. 646 62 Stat. 928 2

Title 28, USC § 1333 c. 646 62 Stat. 931 5

Title 46 USC §§ 1300-15 5



IN THE

Supreme Court of the United States

OCTOBER TERM - 1972

No. _____

In the Matter of the Complaint of
UNTERWESER REEDEREI, GMBH,
for Exoneration from or Limitation
of Liability as Owner of the M/S BREMEN

UNTERWESER REEDEREI, GMBH

Petitioner,

v.

ZAPATA OFFSHORE COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners, M/S BREMEN and UNTERWESER REEDEREI, GMBH, pray that a Writ of Certiorari Issue to review the decision of the United States Court of Appeals for the Fifth Circuit entered in this cause.

DECISION TO BE REVIEWED

Petitioners seek review of the decision rendered in the Matter of the Complaint of UNTERWESER REEDEREI, GMBH, for Exoneration from or Limitation of

Liability as Owner of the M/S BREMEN and UNTER-WESER REEDEREI, GMBH.-vs- ZAPATA OFFSHORE COMPANY, 428 F.2d 888 (5th Cir. 1970) Affirmed en banc, No. 27497, Slip Opinion June 28, 1971, F.2d . (*infra*, Appendices A and B.)

One of the Orders of the United States District Court for the Middle District of Florida is reported at 296 F.Supp. 733. The Orders, Findings of Fact and Conclusions of Law of the United States District Court for the Middle District of Florida are appended hereto. (*infra*, Appendices C and D.)

JURISDICTION

The decision sought to be reviewed herein was entered June 19, 1970. (Appendix A.) A timely Petition for Rehearing and Suggestion for Rehearing En Banc was granted by Order dated August 18, 1970. The opinion of the three-judge panel of the Court, rendered June 19, 1970, was adopted by the majority of the Court upon rehearing en banc June 28, 1971. (Appendix B.) This Petition for Certiorari was filed less than ninety days from the date of rehearing en banc. No extensions of time have been granted within which to petition for Writ of Certiorari.

Jurisdiction is based upon Title 28, USC § 1254 (1); c. 646, 62 Stat. 928.

QUESTIONS PRESENTED

The District Court refused to accede to the contractual choice of forum contained in the towage contract, to-wit: "any dispute arising must be treated before the London Court of Justice". This ruling was affirmed by

the United States Court of Appeals for the Fifth Circuit. It is respectfully submitted that the Opinion of the Court of Appeals is ambiguous and therefore presents the following questions:

1. Whether the selection of a forum for the resolution of disputes by parties of equal bargaining power contracting at arms-length is *per se* invalid as a violation of any legitimate public policy of the United States.

2. If the forum clause agreed upon by the parties in the instant case is merely unenforceable by virtue of being unreasonable, did the United States Court of Appeals for the Fifth Circuit commit fundamental error in determining that (a) the reasonableness of the forum provision can be determined solely by considerations of forum non-conveniens and (b) in holding that the *Petitioner had the burden* of showing the reasonableness of the stipulated forum.

STATUTORY PROVISIONS

The questions presented by this Petition do not arise under any specific constitutional provision, treaty, statute, ordinance or regulation of the United States, but involve crucial determinations of the public policy of the United States; the judicial policy of the United States courts with respect to international transactions; and over-riding and controlling questions of international comity.

STATEMENT OF THE CASE AND FACTS

District Court Jurisdiction

This litigation began with a Complaint in Admiralty filed by ZAPATA against BREMEN and its owner,

UNTERWESER (hereinafter the "initial action"). ZAPATA'S Complaint prayed for damages sustained by the barge CHAPARRAL which were allegedly caused by the negligence of UNTERWESER and BREMEN while CHAPARRAL was in the tow of BREMEN en route to the Adriatic from Venice, Louisiana. (R. 1)[1]

UNTERWESER filed a motion in the District Court requesting that the Court decline jurisdiction of the cause or alternatively stay the prosecution of the cause pursuant to a forum provision contained in the Towage Contract executed by the respective parties. (R. 19) Before this motion was heard by the District Court, UNTERWESER initiated proceedings against ZAPATA in the High Court of Justice, London, England, in accordance with the Towage Contract.

Approximately one week prior to the expiration of the statute of limitations, and before the District Court had ruled on its motion, UNTERWESER filed its Complaint seeking exoneration from and limitation of liability (hereinafter the "limitation proceeding"). (R.85) The initial action of ZAPATA was thereupon stayed and four weeks later the District Court entered its Memorandum and Order in the initial action, refusing to decline jurisdiction or to stay the action as requested by UNTERWESER. (R.80) (Appendix C.)

---

[1]References are to the documents contained in the printed Appendix to the briefs filed in the United States Court of Appeals for the Fifth Circuit which the Petitioner has requested the Court of Appeals to certify to the Supreme Court of the United States. The original record in this cause is not now available for certification since the same was destroyed in a recent fire in the office of the Clerk of the United States Court of Appeals for the Fifth Circuit. However, all records and documents necessary to a determination of the issues are reproduced in the printed Appendix.

ZAPATA filed a claim (R.102) and an answer (R.104) in the limitation proceeding and a motion for injunction praying that the District Court enjoin UNTERWESER from further prosecution of the action in the High Court of Justice. (R.118) UNTERWESER renewed its motion for stay in the limitation proceedings. (R.205) The District Court denied the motion for stay and instead enjoined UNTERWESER from pursuing the London action. (R.224) (Appendix D)

The jurisdiction of the District Court was predicated upon the Constitution of the United States, Article III, Section 2, and Title 28 USC § 1333, c.646, 62 Stat. 931 (amended), and 46 USC § 181, *et seq.*, c.43, 9 Stat. 635 (amended).

The Towage Contract

The Towage Contract was the product of an arms-length transaction ". . . made between two responsible corporations involved in an international trasaction." (Appendix A, p. 16, Wisdom, J., dissenting.) The voyage, contemplated by the Towage Contract, was to have traversed numerous jurisdictions from the Mississippi River to the Adriatic Sea and was, accordingly, to be subject to the intermittent civil jurisdiction of numerous sovereigns.

Before contracting for the tow of CHAPARRAL, ZAPATA solicited bids from several ocean-towing companies. UNTERWESER'S bid was the lowest. After being advised that its bid had been accepted, UNTERWESER was requested by ZAPATA to furnish a written towage contract for consideration. A contract was drafted by UNTERWESER in Bremen, Germany, and

sent to ZAPATA in Houston, Texas. In place of the usual provision for German jurisdiction which UNTERWESER ordinarily specifies in its contracts, as well as the application of German law, UNTERWESER specified an English forum and English law ". . . as a reasonable compromise with an American firm in a transaction requiring an oil rig to traverse the Gulf of Mexico, the Atlantic, the Mediterranean, and the Adriatic." (Appendix A, p. 16, Wisdom, J., dissenting.) After a consideration of the contract, ZAPATA made several changes, executed the contract and returned it to UNTERWESER. UNTERWESER accepted the contract and finally executed it in Bremen on November 3, 1967. (R.21; 62)

The Collapse of the CHAPARRAL

On January 5, 1968, BREMEN[2] departed Venice, Louisiana, and proceeded into the Gulf of Mexico with CHAPARRAL[3] in tow. The flotilla was en route to the Adriatic when, during the early morning hours of January 9, 1968, in international waters (R.22), the legs of the CHAPARRAL collapsed and fell into the sea. Thereafter, BREMEN rendered salvage services and, upon orders from ZAPATA, proceeded toward Tampa Bay, the nearest point of refuge.

Upon arriving in Tampa Bay on January 12, 1968, the BREMEN was arrested by the United States Mar-

---

[2]A deep sea tug of 1200 gross tons, 7500 horse power, 178 feet in length, 40 feet in beam, built and registered in Germany in 1967. She was manned by a crew of 23 German nationals.

[3]A self-elevating drilling barge of 4,750 gross tons, documented at Houston, Texas, on January 2, 1968. While under tow, CHAPARRAL was manned by a crew and a Master of ZAPATA. CHAPARRAL is 180 feet in length and 205 feet in breadth; she is equipped with three legs, each 435 feet high.

shal and served with a copy of ZAPATA's Complaint seeking damages in the amount of $3,500,000 against BREMEN and UNTERWESER. (R. 7)

The Initial Proceeding

On January 29, 1968, UNTERWESER filed its Motion to Dismiss for Lack of Jurisdiction, or Alternatively, for Entry of an Order Declining Jurisdiction and/or Staying the Further Prosecution of [the Initial Proceeding]. (R. 19) This motion was predicated upon paragraph 8 of the General Towage Conditions of the Towage Contract which provided:

> Any dispute arising must be treated before the London Court of Justice. (R. 27)

On the same date the District Court heard argument upon a motion for protective order filed by UNTERWESER (R. 28); at that time the Court was orally advised that the questions raised in the motion to decline jurisdiction or stay the action would control the litigation.

The parties completed arrangement for release of the BREMEN. ZAPATA ultimately accepted a letter of undertaking in the amount of $3,500,000 and pursuant thereto, BREMEN was released from arrest on January 26, 1968.[4]

---

[4]The letter of undertaking was issued under the signature of Lamorte, Burns & Co., Inc. One condition of the letter of undertaking was that UNTERWESER gave up no rights in connection with any defenses to the action by ZAPATA; specifically mentioned were rights of UNTERWESER to challenge jurisdiction and to petition for limitation of liability. (R. 17).

London Action

In accordance with the forum provision of the Towage Contract, UNTERWESER instituted an action against ZAPATA in the High Court of Justice in London.[5] On February 21, 1968, the High Court of Justice issued a writ of summons. The writ was served upon ZAPATA on March 14, 1968. (R. 46, 48) ZAPATA appeared in the London action and moved to dismiss the writ of summons. Its motion to dismiss was predicated upon three principal grounds: (1) that the English Court was not a convenient forum; (2) that proceedings between the parties had previously been commenced in the United States; and (3) that the writ was not properly served. The High Court of Justice ruled that the writ of summons had been properly served, that it had jurisdiction and that the action should go forward. (Opinion High Court of Justice, R. 206) ZAPATA immediately appealed the ruling of the High Court of Justice to the English Court of Appeal. The ruling was affirmed, the Court of Appeal held that the forum provision of the Towage Contract was reasonable and that no showing had been made by ZAPATA which would compel the Court to refuse to enforce the written agreement. (*infra*, Appendix E) (R. 215)

Limitation Proceeding

While ZAPATA was contesting the action in the High Court of Justice, the parties were preparing for argument on UNTERWESER's Motion to Decline Jurisdiction or for a stay of the initial action in the District Court. UNTERWESER presented the issue to the District Court as follows:

---

[5]UNTERWESER's suit sought affirmative relief against ZAPATA for breach of the contract, damages for loss of towing gear and for towage hire due.

> The basic issue presented by Defendant's Motion is whether Plaintiff [ZAPATA] has rightfully brought suit in this Court. Rather than being strictly jurisdictional, the issue is whether Plaintiff can be permitted to proceed in this forum contrary to its contract obligation, to the prejudice of Defendant. The court must decide whether, in light of the law and circumstances of this case, it will give effect to the express contractual intent of the parties and thereby decline to exercise its jurisdiction. (R.44)

At oral argument, UNTERWESER advised the District Court of the initiation of the London action. UNTERWESER also offered that all security given to ZAPATA in the initial action would remain available to satisfy any relief granted in any action or counterclaim by ZAPATA in London. The District Court reserved ruling on UNTERWESER's Motion following oral argument on April 29th.

By July 2nd, UNTERWESER was confronted with expiration of the six-month period for filing of a limitation proceeding in the United States; *the District Court not having ruled on its motion to decline jurisdiction or for stay of the initial action.* The High Court of Justice had held that UNTERWESER's London action was properly brought and that Towage Contract should be enforced, but ZAPATA was appealing that decision. Faced with the possibility of adverse rulings in the District Court and in the English Court of Appeal, UNTERWESER reluctantly filed its limitation action. (R. 85) A bond for $1,390,000 was filed and the District Court entered an order in the limitation action staying the initial suit brought by ZAPATA. (R.94, 97)

On July 23rd, the English Court of Appeal affirmed the ruling of the High Court of Justice, (Appendix F) (R. 215), and on July 29th, the District Court ruled on UNTERWESER's motion to decline jurisdiction or for stay in the initial action; its Order denied the relief requested. (Appendix C) (R. 80)

After entry of the adverse appellate decision in the English proceedings, ZAPATA filed Motion for Injunction in the Tampa limitation proceeding seeking to enjoin UNTERWESER from further prosecution of the English action in the High Court of Justice. (R. 118) UNTERWESER again sought to enforce the forum provision of the Towage Contract by filing a Motion to Stay the limitation action pending determination of UNTERWESER's action against ZAPATA in the High Court of Justice. (R. 205)

The District Court, not viewing the provisions of the Towage Contract as relevant, denied UNTERWESER's Motion for stay and at the same time granted ZAPATA's Motion for Injunction. Pursuant to such Order, UNTERWESER was enjoined from the further prosecution of its action against ZAPATA in London (Appendix D) from which Order UNTERWESER appealed to the United States Court of Appeals for the Fifth Circuit.

The Opinion of the Court of Appeals

The opinion of the United States Court of Appeals for the Fifth Circuit is ambiguous with respect to the grounds for holding in *Carbon Black Export, Inc. v. The SS Monrosa,* 254 F.2d 297 (5th Cir. 1958) *cert. dismissed,* 359 U.S. 180, *rehearing denied,* 359 U.S. 999 (1959), reiterating the following passage as representing the "majority view" (Appendix A, p. 10, n.26):

> In essence, the motion [to decline jurisdiction] was based upon Clause 27 as buttressed by the doctrine of forum non-conveniens. Any consideration of such a question starts with the *universally accepted rule that agreement in advance of controversy, whose object is to oust the jurisdiction of the courts, are contrary to public policy and will not be enforced.* (emphasis supplied) (Appendix A, p. 10)

In addition to its reliance upon *Carbon Black's* holding of *per se* invalidity of forum provisions as against "public policy", the Court of Appeals struck down the forum clause as unreasonable (and thus unenforceable) on the basis of non-conveniens:

> It is within the sound discretion of the District Court to decline jurisdiction on the basis of forum non-conveniens. But apart from the forum selection clause itself the circumstances supported a retention and determination by the District Court. Though the towage contract envisioned a long voyage with potential exposure to the jurisdiction of numerous states, the flotilla never escaped the Fifth Circuit's mare nostrum, and the casualty occurred in close proximity to the District Court. (footnotes omitted)
> (Appendix A, p. 12)

Moreover, the Court of Appeals held that since Zapata was a United States citizen, "[t]he discretion of the District Court to remand the case to a foreign forum was consequently limited." The court further "noted" that there were *"indications"* that ZAPATA's substantitive rights would be "materially affected" if the dispute was litigated in an English Court since the Towage Contract contained certain "exculpatory provisions" which, according to the Fifth Circuit "... are apparently contrary to public policy and unenforceable

in American courts," (footnote omitted) (Appendix A, p. 13), relying upon Reese, *The Contractual Forum: Situation in the United States,* 13 Am.J.Com.L. 187, n.33 (1964):

> [E]ffect should be denied the clause if there is reason to believe that the courts of the selected state would deal *unfairly* with the plaintiff or would deny him relief to which he is entitled. (Appendix A, p. 14)

Upon rehearing, en banc, a dividend Court of Appeals affirmed per curiam and adopted the opinion of the original panel.

REASONS FOR GRANTING THE WRIT

1. The Fifth Circuit's decision conflicts with this Court's decision in *National Equipment Rental v. Szukhent,* 375 U.S. 311, 84 S.Ct. 411, 11 L.Ed.2d 354 (1964) and with decisions of the United States Courts of Appeal for the Second and Third Circuits.

The Fifth Circuit affirmed the order of the District Court enjoining UNTERWESER from prosecution of its action in London in accordance with the forum provision of the Towage Contract and refused UNTERWESER's Motion to Stay the Limitation proceeding[6] pending outcome of the London action. The Fifth Circuit relied upon its decision in *Carbon Black Export, Inc. v. The SS Monrosa,* 254 F.2d 297 (5th Cir. 1958) for the proposition that forum clauses are *per se* illegal and unenforceable as provisions designed to oust courts of their jurisdiction.

---

[6]The limitation proceeding having been necessitated by the district court's failure to rule on UNTERWESER's Motion to Stay the Initial Action within the statutory period for filing a Limitation Petition. (Statement of Case and Facts, *supra;* p. 9; Appendix B, pp. 5-6, Wisdom, J., dissenting).

To the extent that the Fifth Circuit's decision holds that forum provisions are *per se* invalid and against public policy, it irreconcilably conflicts with this Court's decision in *National Equipment Rental v. Szukhent*, 375 U.S. 311, 84 S.Ct. 411, 11 L.Ed.2d 354 (1964) wherein it is stated:

> The purpose underlying the contractual provision here at issue seems clear. The clause was asserted by the petition and agreed to by the respondents in order to assure that any litigation of the lease would be conducted in the State of New York. The contract specifically provided that 'This agreement shall be deemed to have been made in Nassau County, New York, regardless of the order in which the signatures of the parties shall be affixed hereto, and shall be interpreted, and the rights and liabilities of the parties here determined, in accordance with the laws of the State of New York,' and it is so, that as the courts below recognized, that parties to a contract may agree in advance to submit to the jurisdiction of a given court, to permit notice to be served by the opposing party, or even to waive notice altogether. (citations omitted) (375 U.S. 315-316)

This Court's recognition of, and the presumption of validity afforded forum provisions in *Szukhent*, has been followed by district courts in other decisions. The outmoded concept of ousting the jurisdiction of the court has not been applied in these decisions; rather, absent a statutory prohibition, forum provisions have been subjected to scrutiny only to determine whether or not under the circumstances of the particular case,

the provision in reasonable.[7] It is difficult to rationalize the Fifth Circuit's holding in view of the fact that the projected voyage at the time of contract was subject to numerous jurisdictions, and in view of the fact that the District Court obtained jurisdiction of the initial action solely through fortuitous circumstances; thus a rejection of the present forum clause as an attempt to "oust the jurisdiction of the court" is illogical.[8]

The Fifth Circuit attempts to find some support for its rejection of forum clauses in *Indussa Corp. v. S.S. Ranborg*, 377 F.2d 200 (1967) in which the Second Circuit overruled its prior decision in *Wm. H. Muller & Co. v. Swedish American Line, Ltd.*, 224 F.2d 806 (1955) which had held a forum provision (calling for resolu-

---

[7] *See* e.g. *United States v. Roscoe-Ajax Construction Co.*, 246 F. Supp. 439 (N.D. Cal. 1965) (Miller Act prohibition); *National Equipment Rental Ltd. v. Centra Cast Co.*, 270 F. Supp. 999 (E.D.N.Y. 1966) (forum provision valid and enforceable); *Geiger v. Keelani*, 270 F. Supp. 461 (E.D.Mich. 1967); *National Equipment Rental Ltd. v. Saunders*, 271 F. Supp. 756 (E.D.N.Y. 1967) (forum provision not per se invalid); *San Juan Hotel Corporation v. Lefkowitz*, 277 F. Supp. 28 (D. Puerto Rico 1967) (forum provision enforceable); *Hawaii Credit Card Corp. v. Continental Credit Card Corp.*, 290 F. Supp. 848 (D. Hawaii 1968) (forum provision enforceable when reasonable); *Matthiessen v. National Trailer Convoy, Inc.*, 294 F. Supp. 1132 (D.Minn. 1968) (forum provision enforceable if reasonable); *Aamco Automatic Transmissions, Inc. v. Hagenbarth*, 296 F. Supp. 1142 (E.D. Pa. 1968) (forum provision enforced).

[8] As pointed out by Judge Wisdom in his Dissent on Rehearing (Appendix B, pp. 5-6) any contention that UNTERWESER voluntarily waived its right to assert the forum provision by filing the limitation action (Appendix A, p. 8) denies reality. Immediately following the arrest of the BREMEN, UNTERWESER asserted the primacy of the forum provision by filing its motion to dismiss, decline jurisdiction and/or stay prosecution and by initiating the London action. UNTERWESER was forced to file the limitation proceeding when the District Court failed to rule on its Motion until after the statutory period for filing the limitation action had run.

tion of disputes in a Swedish court) was valid under the Carriage of Goods by Sea Act, 46 USC §§ 1300-15 (COGSA). However, in overruling *Muller*, the Second Circuit in *Indussa* made it undeniably clear that its rejection of the *Muller* forum provisions was based solely upon the statutory prohibitions of COGSA and *not upon general principles of contract law*. 377 F.2d at 202. (See: Appendix A, pp. 24-25, Wisdom, J., dissenting)[9] That the Second Circuit in *Indussa* was not holding forum clauses *per se* invalid is made doubly clear when one refers to that circuit's holding in *National Equipment Rental Ltd. v. Reagin*, 338 F.2d 759 (2d Cir. 1964) wherein the Court characterized this Court's holding in *Szukhent* as evidencing ". . . a federal policy in favor of upholding such clauses. . .". 338 F.2d at 762.

The Third Circuit in *Central Contracting Co. v. Maryland Casualty Co.*, 367 F.2d 341 (1966) held that reasonable forum provisions in contracts are enforceable and that such provisions are not *per se* "an affront to the judicial power, which must be stricken down." 367 F.2d at 345.

The ambiguity of the Court's opinion arises from the fact that after the Court had utilized *Carbon Black* to strike down the forum clause, the Court sought to find additional support for its holding on two alternative grounds: (1) the presence of so-called "exculpatory pro-

---

[9]COGSA applied to *Muller* as it undoubtedly applies to the Fifth Circuit's decision in *Carbon Black*. The majority's opinion in the Fifth Circuit fails to recognize COGSA's controlling effect upon the Second Circuit's holding in *Indussa*. The majority's opinion deals superficially with the result of the *Indussa* decision and consequently fails to heed *Indussa's* admonition that its holding was not dictated by general principles of contract law but solely by COGSA.

visions" in Towing Contract which ". . . are *apparently* contrary to public policy and unenforceable in American courts" (Appendix A, p. 13-14) (emphasis supplied); and, (2) the "discretion" of the District Court when faced with a forum clause which is "unreasonable" only from the standpoint of forum non-conveniens. (Appendix A, p. 12-15)

The majority conclusion that the so-called "exculpatory provisions" violated public policy is based upon the ". . . determining authority" (Appendix A, p. 36 n.29, Wisdom, J., dissenting) of *Bisso v. Inland Waterways Corporation,* 349 U.S. 85, 75 S.Ct. 629, 99 L.Ed. 911 (1955). (Appendix A, p. 13-14). As pointed out by Judge Wisdom in his dissent (Appendix A, p. 36-38) the question of "public policy" of the United States arises solely from fortuitous circumstances and ZAPATA's failure to abide by its contractual obligations. Moreover, *Bisso's* prescription is manifestly not so strong as to overcome the requirements of the *Erie* doctrine. *See: Seaboard Coastline Railroad Company v. Tennessee Corporation,* 421 F.2d 970 (5th Cir. 1970); (Appendix A, p. 36, Wisdom, J., dissenting)[10] Why then the imposition of this questionable federal policy on an arms-length international contract? The only basis presented by the Court's opinion was that:

> The District Court was entitled to consider that remanding ZAPATA to a foreign forum, with no practical contract with the controversy, could raise a bar to recovery by a United States citizen which his own convenient courts would not countenance. (Appendix A, p. 13-14)

---

[10]Inequality in bargaining position, so ominously present in *Bisso* is manifestly lacking in the present case. (R. 21, 62) (Appendix A, p. 16-17, Wisdom, J., dissenting).

Any apparent "bar" to ZAPATA's recovery would not be the result of the application of principles violating any *valid* "public policy" of the United States, but would be the result of the studied dealings between the parties themselves in a free international market (surely ZAPATA would not qualify as a ward of the court). As stated by Judge Wisdom in his original dissent, Appendix A, p. 36:

> The question here is whether the fact that a towage contract is involved and the fact that we are sitting in admiralty requires us to outlaw a forum that might enforce exculpatory clauses.

In relying upon the concept of reasonableness as a basis for rejection of the forum clause, the Fifth Circuit cited the Third Circuit's decision in *Central Contracting Co. v. Maryland Casualty Company, supra*. While the Third Circuit in *Central Contracting* did require a standard of reasonableness which respect to forum provisions, it unequivocally held that the burden of proving unreasonableness was on the party seeking to annul the contractual provision. By applying the doctrine of forum non-conviens "... the standard for which is that the plaintiff's [ZAPATA] choice of forum 'should rarely be disturbed' unless 'the balance is strongly in favor' of the defendant", (Appendix A, p. 41, Wisdom, J., dissenting), *Gulf Oil Corporation v. Gilbert*, 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947), the District Court and the Fifth Circuit have placed the burden upon UNTERWESER rather than ZAPATA, the party seeking to withdraw from the initial choice of forum.

If the Court's opinion stands for the proposition that forum provisions are *per se* invalid, then the opinion is in conflict with other cases. If the Court's opinion

stands for the proposition that forum provisions are enforceable if not unreasonable, then the decision is fundamentally erroneous in that the burden of proving unreasonableness was misplaced. In either event, the Fifth Circuit's opinion conflicts with opinions of this Court, the Second and Third Circuits. It is respectfully submitted that the foregoing conflicts justify the grant of certiorari to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit.

2. In the interest of international trade, commerce and comity, The Supreme Court should determine the conditions under which forum provisions in international contracts will be honored, if at all, in United States courts.

The decision of the Fifth Circuit will have the effect of fostering both uncertainty in the field of international commercial transactions whre the United States citizens are a party, and distrust of United States courts stemming from the application of outmoded concepts which ignore the parties' arms-length transactions in favor of a "judicial discretion" based upon a combination of national origin and fortuitous circumstances. Contrary to the Fifth Circuit's opinion, the initial choice of forum was the High Court of Justice and not the United States District Court; the former being an essential element of UNTERWESER's participation and undertaking (R. 22)—the latter a fortuitous circumstance. As stated by Judge Wisdom in his dissent on rehearing (Appendix B, p. 88):

> The decision of the majority is a backwards step by a forward-looking court. It has no place in a shrinking world where international commercial transactions are becoming increasingly commonplace. The safeguard against abuse of a forum clause is the local court's power to determine the reasonableness of enforcing the clause. But the

burden of proving unreasonableness should fall on the parties seeking to escape from the obligation he contracted to undertake. ZAPATA has failed to show any good reasons for backing out of its bargain.

The Fifth Circuit's opinion in this cause will certainly do much to destroy the uniformity of international maritime law and relations which this Court has heretofore confirmed as "desirable". *Standard Oil Company v. United States,* 340 U.S. 54, 59, 71 S.Ct. 135, 95 L.Ed. 68 (1950); *Aetna Insurance Company v. United Fruit Company,* 304 U.S. 430, 58 S.Ct. 959, 82 L.Ed. 1443 (1938). (*See* Appendix A, p. 19, Wisdom, J. dissenting) The Court's decision does little to enhance any valid concepts of national or federal judicial sovereignty and at the same time negates by rendering uncertain the application of valid international commercial and judicial standards in American courts, and all but destroys valid concepts of comity which American courts, and especially federal courts, owe to courts of foreign countries. *See: Canadian Filters (Harwich) Limited v. Lear-Siegler, Inc.,* 412 F.2d 577 (1st Cir. 1969)

The Fifth Circuit's conclusion that "the discretion of the District Court to remand the case to a foreign forum was . . . limited" because "ZAPATA, . . . is a United States citizen" (Appendix A, p. 13) represents the end result of a distortion of the purpose of an *arms-length* forum clause as well as basic concepts of contract, jurisdiction and international comity. Moreover, the Court's opinion fails to suggest a factual basis for the inference (Appendix A, p. 14) that ZAPATA has been treated "unfairly" by the London Court of Justice or has been denied relief ". . . *to which he as (sic) entitled.*" The suggestion that ZAPATA'S rights would be prejudiced or that it would be treated "unfairly" if it

were subsequently held that ZAPATA must honor its contractual commitments which were freely and voluntarily made is a rejection of principles of international judicial comity. Again, the situation represented in this case is succinctly stated by Judge Wisdom in his original dissent (Appendix A. p. 38-39):

> ZAPATA's American citizenship may very well be an argument in some cases for refusing to decline jurisdiction on the basis of forum non-conveniens. *Swift & Company Packers v. Compania Colombiana,* 1950, 339 U.S. 684, __S.Ct.__, 94 L.Ed 1206, decided on forum non-conviens principles (no forum clause was mentioned) that it would not deny an American citizen his American forum primarily because there was no assurance that the defendant would appear with adequate security in the foreign court. Here, of course, UNTERWESER and ZAPATA have already joined argument in the English courts, the English courts have ruled that they have jurisdiction, and UNTERWESER has offered to post the same security that is available to ZAPATA here. The Supreme Court in Swift, moreover, expressly declined to decide the 'abstract question whether United States admiralty courts may decline jurisdiction over libels brought by United States citizens.' 339 U.S. at 697, 94 L.Ed. at 1215. In this case we deal with a situation where ZAPATA voluntarily and specifically surrendered in the contract its right to proceed in American courts. *See Cerro de Pasco Copper Corp. v. Knut Knutsen,* 2 Cir. 1951, 187 F.2d 990, 991 *(Swift* "inapposite" in context of a forum clause). A proper solicitation for the Interests of American citizens may militate in favor of enforcing these clauses. *Otherwise, Americans who wish to contract with foreign nationals and who are willing to accept a forum clause will have difficulty in convincing the foreign party that he can rely on the agreement.* (footnotes omitted) (emphasis supplied).

The reasonableness of a contractual forum provision arrived at through arms-length negotiation by parties regularly engaged in international transactions must not be determined through concepts of "convenience", national origin or pure jurisdictional "power". *See: Canadian Filters (Harwich) v. Lear-Siegler, Inc., supra,* at 578. As noted by Judge Wisdom in his dissent (Appendix A, pp. 32-34) ". . . where parties have selected a forum without the benefit of hindsight" or fortuitous circumstances, there are more relevant standards:

> "1. Did the parties freely and intelligently enter their agreement? * * *
>
> 2. Would the stipulated forum, in rendering its decision, transgress an *important* public policy of the present forum? * * *
>
> 3. Would the designated forum adjudicate the parties' dispute? * * *
>
> 4. Is the designated forum seriously inconvenient for the trial of the action?"

The uncertainty of the Fifth Circuit's opinion establishes a need for a clear enunciation of the standards to be applied with respect to enforcement of forum clauses in international maritime contracts. Among the issues and questions which must be clarified by this Court are:

1. The standards to be applied in determining the reasonableness of international forum provisions.

2. The degree of comity owed foreign courts whose jurisdiction has been invoked by a forum provision with respect to the *exercise* of jurisdiction by United States District Courts in the face of a contractual forum provision.

3. To what extent will United States courts impose its so-called "public policy" upon international commercial transactions?

4. Who will carry the burden with respect to the standards of reasonableness?

CONCLUSION

For the foregoing reasons a Writ of Certiorari should be issued from this Court to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

DAVID C. G. KERR
of MACFARLANE, FERGUSON, ALLISON & KELLY
Post Office Box 1531
Tampa, Florida 33601

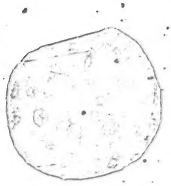
Counsel for Petitioner

JACK C. RINARD
of MACFARLANE, FERGUSON, ALLISON & KELLY
Post Office Box 1531
Tampa, Florida 33601

Of Counsel for Petitioner

WARREN M. FARIS and
J. Y. GILMORE, JR.
of FARIS, ELLIS, CUTRONE, GILMORE & LAUTENSCHLAEGER
1207 Whitney Building
New Orleans, Louisiana 70130

Of Counsel for Petitioner



APPENDIX A

OPINION
OF THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 27497

In the Matter of the Complaint of
UNTERWESER REEDEREI, GMBH

ZAPATA OFF-SHORE COMPANY,
Plaintiff-Appellee,

versus

M/S BREMEN and UNTERWESER REEDEREI GMBH,
Defendants-Appellants

Appeal from the United States District Court for the Middle District of Florida

---

(June 19, 1970)

Before WISDOM, GEWIN and AINSWORTH, Circuit Judges.

GEWIN, Circuit Judge: Unterweser Reederei, GMBH (Unterweser), seeks review of an order of the district court denying a stay of the limitation action Unterweser had filed in that court and enjoining Unter-

weser from proceeding further with litigation concerning the same subject matter in an English court. The limitation action was brought after Zapata Off-Shore Company (Zapata) filed a complaint in admiralty againt Unterweser and its tug Bremen.

Unterweser, a German corporation, contracted with Zapata, a Delaware corporation, with its principal place of business in Houston, Texas, to tow Zapata's drilling barge 'Chaparral'[1] from Venice, Louisiana to Ravenna, Italy. The towage contract contained a forum selection clause providing that any dispute must be litigated before the High Court of Justice in London, England. On 5 January 1968, the Unterweser tug Bremen[2] departed Venice, Louisiana with the Chaparral in tow. During the morning of 9 January 1968, the Chaparral suffered a casualty while proceeding in the Gulf of Mexico. Pursuant to instructions from Zapata, Bremen made for Tampa Bay, the nearest port. Promptly upon arrival, Bremen was arrested by a United States Marshal and her master served with a copy of Zapata's complaint seeking $3,500,000 in damages from Bremen and Unterweser.[3]

Unterweser filed a motion praying in the alternative that the district court (1) dismiss for want of jurisdiction, (2) decline jurisdiction on the basis of forum non conveniens, or (3) stay further prosecution of the action.[4] Unterweser subsequently instituted an action

---

[1]A self elevating drilling barge, 180 feet in length and 205 feet in breadth, of 4750 gross tons.

[2]A deepsea tug, 178 feet in length, 40 feet in beam, of 1200 gross tons and 7500 horsepower. Bremen was built and registered in Germany and manned by a crew of 23.

[3]Bremen was released from arrest on 26 January 1968, after Unterweser had furnished a letter of undertaking in the amount of $3,500,000.

[4]This motion was denied by the district court on 29 July 1968, after Unterweser had filed its limitation action. Unterweser sought to have this order certified in order to take an immediate appeal pursuant to 28 U.S.C. § 1292(b). The district court refused to certify the order, finding that the question had been mooted by the filing of Unterweser's limitation action and the consequent stay of Zapata's original action.

against Zapata in the High Court of Justice in London, claiming moneys due under the towage contract and damages for breach of contract. Zapata was served with the summons of that court; it appeared and moved that the English court dismiss its process. The High Court of Justice denied Zapata's motion holding that it had jurisdiction of the action. This determination was affirmed by the English Court of Appeal which held the forum selection provision of the contract to be reasonable and found no circumstances which would require it to deny enforcement of the agreement.

Before the English Court of Appeal had rendered the above decision, Unterweser filed a complaint in the district court seeking exoneration or limitation of liability arising from the casualty.[5] Consequently the district court entered the usual injunction restraining claimants from proceeding outside the limitation court regarding the events of 9 January 1968. Zapata filed its claim in the limitation proceedings asserting the same cause of action as in its original action. Unterweser filed objection to Zapata's claim and counter claimed against Zapata alleging the same claims embodied in its English action plus an additional salvage claim.

Zapata moved for an injunction restraining Unterweser from litigating further in the High Court of Justice. Unterweser moved to stay its own limitation proceeding pending a determination of Unterweser's suit in the English court. The district court denied the requested stay and enjoined Unterweser from proceeding in any other court regarding the same matter prior to a determination of the limitation action.[6] Unterweser appeals from these orders, and we affirm.

I

We shall first comment on the power of the district court to restrain Unterweser from proceeding with its

[5] See 46 U.S.C. § 185 *et seq.*

[6] In re Unterweser Reederei, GMBH, 296 F. Supp. 733 (M.D. Fla. 1969).

action in England. A court of equity has the traditional power to enjoin parties, properly before it, from litigating in another court. This power has been exercised where the foreign litigation would: (1) frustrate a policy of the forum issuing the injunction; (2) be vexatious or oppressive; (3) threaten the issuing court's in rem or quasi in rem jurisdiction; or (4) where the proceedings prejudice other equitable considerations.[7] We must now determine whether this traditional power of the Chancellor appertains to a district court sitting in a limitation proceeding.

Prior to the decision below there has been scant judicial discussion of the power of an admiralty court to enjoin a party bringing a limitation action from contemporaneous litigation in foreign courts. Our research has added little of significance to the authority cited by the district court. The principal decision on the question was rendered by the Second Circuit in *The Salvore*.[8] In that case, the owners of cargo damaged while on board the Salvore brought a libel in the district court. The Salvore's owner sued the cargo claimants in an Italian court for abuse of process, and subsequently brought a limitation proceeding in the district court. On a motion by the cargo claimants, the district court held that it was without power to stay the limitation proceeding or to compel the shipowner to discontinue its Italian suit. In reversing, the Second Circuit relied on the Supreme Court's description of a limitation proceeding as "the administration of equity in an admiralty court; look[ing] to a complete and just resolution of a many cornered controversy."[9] It stated:

> The limitation proceeding was an appeal to a court of admiralty, which is a court of equity, . . . and the appellee [shipowner], seeking equity, should will-

---

[7] 7 J. Moore, Federal Practice § 65.19 (2d ed. 1953).

[8] 36 F.2d 712 (2d Cir. 1929).

[9] Id. at 713, quoting Hartford Acci. & Indemn. Co. v. Southern P. Co., 273 U.S. 207, 216 (1927).

> ingly do equity. . . . It must be willing to bring in all the controversies in the limitation proceedings, for it has invoked the court's aid.[10]

In *A. C. Dodge, Inc. v. J. M. Carras, Inc.*,[11] the Second Circuit relied on its *Salvore* decision in affirming an order of the district court disolving an injunction entered against claimants in the shipowner's limitation proceeding, and providing that it would be reinstituted only if the shipowner obtained a stay of an action which is was simultaneously pursuing in another federal court. Unterweser seeks to distinguish these cases on the ground that neither involved an injunction of the sort issued in the present case. In *Salvore* and *Dodge*, the courts sought to coerce the shipowner by conditioning the continuance of the injunction, that restrained claimants from litigating outside the limitation court, on voluntary forebearance of the shipowner's foreign action. We find no implication in these cases which would influence us to hold that district courts are impotent to accomplish directly what these courts sought to effect circuitously. To the contrary, the court in *Salvore* expressly stated:

> The court first securing jurisdiction has the authority and power of enjoining the parties to the litigation from proceeding in another jurisdiction.

---

[10] 36 F.2d at 713. An analogous proposition is embodied in the decision of this court in Beal v. Waltz, 309 F.2d 721 (5th Cir. 1962). There, this court upheld the district court's refusal to modify its injunction to allow the shipowner to plead a favorable state court judgment as res judicata in the limitation proceedings he had filed in the district court. This court stated:

> There was no equity in the position of appellant. He could not successfully claim the right in the Federal limitation proceeding to restrain claimant in the state court suit, and still obtain the advantage of the litigation there . . . . 309 F.2d at 724.

[11] 218 F.2d 911 (2d Cir. 1955). This case arose from a collision in the Delaware River. Appellant shipowner filed a limitation petition in the United States District Court for the Eastern District of New York. The owner of the other vessel involved in the collision moved that the court dissolve its prior injunction because appellant was prosecuting a libel against it in Federal District Court in Maryland.

> And the court has an undoubted authority to control all persons and things within its own territorial limits.[12]

Unterweser emphasizes the third case of the trilogy cited in the district court's opinion, *Petition of A/S J. Ludwig Mowinckels Rederi*.[13] There the district court refused to enjoin litigation in an English court by a shipowner participating in a limitation proceeding before the district court. Though there is indication in the opinion that the *Mowinckels* court felt itself limited to the type of order fashioned in *Salvore* and approved in *Dodge*, we agree with the position of the district court below that *Mowinckels* was based on a determination that any restraint of the shipowner was improper under the attendant circumstances.

Since the district court entered its orders below, *Mowinckels* has been affirmed by the Second Circuit.[14] The opinion on appeal supports the interpretation given *Mowinckels* by the district court in the instant case. Citing *Salvore* and *Dodge* with approval, the Second Circuit stated:

> There can be no question . . . that one purpose of the Limitation Act is a concursus or concourse of claimants, and that in an appropriate situation the court may have power to enjoin persons within its jurisdiction with respect to their activities abroad.[15]

---

[12] 436 F.2d at 714.

[13] 268 F. Supp. 682 (S.D. N.Y. 1967). The complex litigation involved in this case arose from a collision off the coast of France. Many of the claims were being litigated in England, and cargo claimants were proceeding with actions against both vessels in French courts. As the court below properly observed, the *Mowinckels* case was influenced by the fact that no one court could obtain control of the entire litigation arising from the collision.

[14] Petition of Bloomfield S.S. Co., ——— F.2d ——— (2d Cir.), [Nos. 33681, 33947, 34015, Feb. 26, 1970].

[15] *Id.*

The opinion makes it clear that the district court's action was based on the equitable considerations of that case, and implies no general limitation on a district court's equitable powers in a limitation action.

> Concededly, the lower court could have restrained Mowinckels' continuance of its collision action in the English courts. But it declined to do so. We can find no fault in this decision. Under the circumstances of this case the lower court's decision was an appropriate exercise of its discretion.[16]

Unterweser also draws our attention to the proposition, quoted by the district court in *Mowinckels* from *British Transport Commission v. United States*,[17] that:

> "[N]o compulsion could be exerted on foreign claimants to file claims" and . . . "an injunction against suits being filed in foreign jurisdictions would be ineffective unless comity required its recognition."[18]

This practical observation is not pertinent to the present situation. Unterweser is not merely a potential claimant outside the jurisdiction of the district court; it is a party which has invoked, albeit reluctantly, that very jurisdiction. Though a domestic court has no power to restrain the courts of a foreign nation, it has admitted power to deal with litigants properly before it. An exercise of the latter power is not the assumption of the former.[19] With both Unterweser and substantial amounts of its assets before the district court, it need not resort to comity to enforce its order.

---

[16] *Id.*

[17] 354 U.S. 129, 142 (1957).

[18] 268 F. Supp. at 690. Also see In re Bloomfield S.S. Co., 227 F. Supp. 615 (E.D. La. 1964), *aff'd sub nom.*, Bloomfield S.S. Co. v. Haight, 363 F.2d 872 (5th Cir. 1966), *cert. denied*, 386 U.S. 913 (1967).

[19] Steelman v. All Continent Corp., 301 U.S. 278 (1937); 7 J. Moore, *supra* note 4.

Unterweser also seeks to distinguish the foregoing authorities since none of these cases involved a forum selection clause. We are of the opinion that this clause is only relevant in determining whether the district court properly refused to stay the limitation proceeding, and, on the facts of this case, does not affect the power of the district court to grant injunctive relief. The implications of the forum clause will be considered in the next section of this opinion. For the moment we conclude that Unterweser's petition for limitation subjects it to the full equitable powers of the district court.[20] In a proper case, these include the power to enjoin a petitioning shipowner from litigating in a foreign forum. As this court observed in *Guillot v. Cenac Towing Co.*,[21] "In the Admiralty the Chancellor now goes to sea and has adequate equitable reserves."

II

Unterweser contends that the district court erred in refusing to stay the limitation action pending a determination of its English suit. It urges that the stay was required by the forum selection clause of the towage contract, which provides: "Any dispute arising must be treated before the London Court of Justice."

At this point it is helpful to pare two questions that are not involved in this appeal. The district court had jurisdiction of the limitation action. We do not understand Unterweser to seriously contend that this jurisdiction was defeated by the presence of the forum clause.[22] Neither are we asked to determine whether Zapata has breached the towage contract by filing the libel in the district court. The question we must decide

---

[20]Petition of A/S J. Mowinckels Rederei, 268 F. Supp. 682, 689-90 (S.D. N.Y. 1967). *See* British Transp. Comm'n v. United States, 354 U.S. 129 (1957).

[21]366 F.2d 898, 904 (5th Cir. 1966).

[22]See 6A A. Corbin, Contracts § 1445 (1962). Also see note 35 *infra*.

is whether the district court was obliged to decline to exercise admitted jurisdiction under the facts of the present case.

In *Carbon Black Export, Inc. v. The SS Monrosa,*[23] this court reversed a order of the district court declining jurisdiction of a libel filed by a cargo shipper. The district court, relying on *Wm. H. Muller & Co. v. Swedish American Line, Ltd.,*[24] had upheld a forum selection clause contained in the bills of lading designating Genoa, Italy as the exclusive situs for legal proceedings,[25] finding that the libellant had not shown the clause to be unreasonable. This court held that the forum clause did not apply to *in rem* proceedings. In holding that the district court erroneously declined *in personam* jurisdiction over the shipowner, this court stated:

> In essence, the motion [to decline jurisdiction] was based upon Clause 27 as buttressed by the doctrine of forum non conveniens. Any consideration of such a question starts with the universally accepted rule that agreements in advance of controversy whose object is to oust the jurisdiction of the courts are contrary to public policy and will not be enforced.[26]

---

[23] 254 F.2d 297 (5th Cir. 1958), *cert. dismissed,* 359 U.S. 180, *rehearing denied* 359 U.S. 999 (1959)

[24] 224 F.2d 806 (2d Cir. 1955). In a cargo consignee's libel against the carrier, the Second Circuit held that a forum clause contained in the bill of lading should be respected unless shown to be unreasonable. See note 29 *infra.*

[25] The forum clause in *Carbon Black* provided:

> Clause 27 — Also, that no legal proceedings may be brought against the Captain or ship owners or their agents in respect to any loss of or damage to any goods herein specified, except in Genoa, it being understood and agreed that every other Tribunal in the place or places where the goods were shipped or landed is incompetent, notwithstanding that the ship may be legally represented there.

[26] 254 F.2d at 300-301. The position of this court in *Carbon Black* reflects what is apparently the majority view regarding forum selection clauses. Annot., 56 A.L.R.2d 300 (1957); 1 E. Benedict, Admiralty § 22a (6th ed. 1940, Supp. 1968).

This court professed no comment on the Second Circuit's decision in *Muller* distinguishing it on its facts. The Supreme Court granted certiorari to resolve an indicated conflict between *Carbon Black* and *Muller*.[27] In *SS Monrosa v. Carbon Black Export, Inc.*,[28] the Court dismissed the writ as improvidently granted though it approved this court's interpretation of the forum clause as having no application to *in rem* actions. Any remaining antagonism between the two opinions was relieved when *Muller* was overruled by the Second Circuit sitting en banc in *Indussa Corp. v. SS Ranborg*.[29]

In *Insurance Co. of North America v. N. V. Stoomvaart-Maatschappij*,[30] the district court was requested to decline jurisdiction on the basis of a forum clause which was more broadly drawn than the clause in *Carbon Black* and analogous to the provision in the instant contract.[31] In denying the request the court stated:

> Here the jurisdictional provision involved in Clause 22 refers to *"Any action,"* obviously referring to both *in personam* and *in rem* actions. Nevertheless, the Fifth Circuit's holding in Carbon Black is applicable and such an attempt to oust the Court of its jurisdiction in advance will be stricken herewith as being contrary to public policy and unenforceable.[32]

---

[27] 358 U.S. 809 (1958).

[28] 359 U.S. 180 (1959).

[29] 377 F.2d 200 (2d Cir. 1967). The *Indussa* court held that *Muller* was inconsistent with the Carriage of Goods by Sea Act, 46 U.S.C. §§ 1300-1315. COSGA also applied to the shipment in *Carbon Black*, but we are unable to read that case as applying only to such shipments.

[30] 201 F. Supp. 76 (E.D. La. 1961).

[31] The clause in Insurance Co. of N. Am. provided:
> Clause 22 — Any action with regard to any dispute or claim arising under this bill of lading and the contract evidenced thereby shall be brought before the Court at Amsterdam to the exclusion of any other court unless the Carrier appeals to another jurisdiction or voluntarily submits himself thereto.

[32] 201 F. Supp. at 78.

As one commentator has reluctantly observed, the *Carbon Black* decision, "At the very least . . . stands for the proposition that a choice of forum clause will not be enforced unless the selected state would provide a more convenient forum than the state in which suit is brought."[33] We conclude that the forum selection clause, in and of itself, did not compel the district court to stay proceedings in the limitation action so that the parties might litigate in England pursuant to its provisions.

It was within the sound discretion of the district court to decline jurisdiction on the basis of forum non conveniens.[34] But apart from the forum selection clause itself the circumstances supported a retention and determination by the district court.[35] Though the towage contract envisioned a long voyage with potential exposure to the jurisdiction of numerous states, the flotilla never escaped the Fifth Circuit's mare nostrum, and the casualty occurred in close proximity to the district court. A considerable number of potential witnesses, including Zapata's crewmen who were aboard the Chaparral, reside in the gulf coast area of the United States. Preparations for the voyage were made in this area, and, after the casualty, inspection of the damage and repair work was conducted there. The testimony of Bremen's crewmen, residing in Germany, is available by

---

[33]Reese, *The Contractual Forum: Situation in the United States*, 13 Am.J.Com.L. 187, 191-192 (1964).

[34]Swift & Co. Packers v. Compania Colombiana Del Caribe, S.A., 339 U.S. 684 (1950). *See* Canada Malting Co. v. Paterson S.S., Ltd., 285 U.S. 413 (1932).

[35]In a footnote to its brief, Unterweser states:

> At oral argument on its Motion, counsel advised the District Court that Unterweser did not intend to press its Motion for Dismissal for Lack of Jurisdiction, nor did it intend to press the *forum non conveniens* argument. It was recognized that the Court did have *in rem* jurisdiction over BREMEN, and it was further recognized that after the fact inconvenience to the parties was not controlling upon the question of enforceability of the contract clause providing for a London forum and English law. Furthermore, upon analysis, there was no strong balance of convenience favoring either the U.S. forum or the London forum, *quite apart from consideration of the Towage Contract.* (Emphasis in original).

way of depositions already taken in the proceedings. The only other nation having significant contacts with, or interest in, the controversy is Germany.[36] England's only relationship is the designation of her courts in the forum clause.

Zapata, the only claimant in the limitation action, is a United States citizen. The discretion of the district court to remand the case to a foreign forum was consequently limited.[37] This is especially true since, as the court noted, there are indications that Zapata's substantive rights will be materially affected if the dispute is litigated in an English court. The towage contract contained the following exculpatory provisions:

> 1. . . . Urag [Unterweser], their masters and crews, are not responsible for defaults and/or errors in the navigation of the tow.
>
> 2.(b) Damages suffered by the towed object [Chaparral] are in any case for account of its owners.

These provisions are apparently contrary to public policy and unenforceable in American courts.[38] However, according to the affidavit of F. D. Bateson, Zapata's English maritime law expert, these clauses would be held prima facie valid and enforceable by an English court.[39] The district court was entitled to consider that

---

[36]Unterweser is a German national. The Bremen was built and is registered in Germany and her 23 crewmen are all German nationals. The towage contract was executed by Unterweser in Bremen, Germany.

[37]Swift & Co. Packers v. Compania Colombiana Del Caribe, S.A., 339 U.S. 684 (1950); Burt v. Isthmus Dev. Co., 218 F.2d 353 (5th Cir.), *cert denied*, 349 U.S. 913 (1955). Annot., 90 A.L.R.2d 1109 § 9 at 1125 (1963).

[38]Dixilyn Drilling Corp. v. Crescent Towing & Salvage Co., 372 U.S. 697 (1963); Bisso v. Inland Waterways Corp., 349 U.S. 85 (1955).

[39]The affidavit stated in part.

> It is my opinion that the above quoted exculpatory clauses, under English law, are not against the public policy of Eng-

remanding Zapata to a foreign forum, with no practical contact with the controversy, could raise a bar to recovery by a United States citizen which its own convenient courts would not countenance.

Moreover, it is doubtful that Unterweser would benefit even if we ignored *Carbon Black* and somehow resurrected the *Muller* rule. The minority of jurisdictions which recognize forum selection provisions, as prima facie valid, deny enforcement where the clause is shown to be unreasonable.[40] One commentator, advocating this position, elaborated on the question of reasonableness:

> [E]ffect should be denied the clause if there is reason to believe that the courts of the selected state would deal unfairly with the plaintiff or would deny him relief to which he was entitled, ...
>
> Likewise, effect should be denied the clause if the selected state is a seriously inconvenient one for the trial of the action, as might b e true in a situation where the occurrence sued upon took place in a distant place from which, if the trial were to be held in the selected state, it would be necessary to transport large numbers of witnesses.[41]

On the facts of the present case the district court did not choose to disturb the original choice of forum.[42] We do not feel it abused its discretion in this regard.

---

land, and would be held to be prima facie valid and enforceable by an English Court should a cause of action be filed in England either by way or original action or by way of counterclaim. . . .

Unterweser does not take issue with Mr. Bateson's interpretation of English law.

[40]Central Contracting Co. v. Maryland Cas. Co., 367 F.2d 341 (3d Cir. 1966); General Motors Overseas Operation Div. v. S.S. Goettingen, 225 F. Supp. 902 (S.D. N.Y. 1964); Chemical Carriers, Inc. v. L.Smit & Co.'s Internationale Sleepdienst, 154 F. Supp. 886 (S.D.N.Y. 1957).

[41]Reese, *supra* note 33 at 189.

[42]Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947).

III

Having declined to stay the limitation action, we feel it was proper for the district court to restrain Unterweser from proceeding in any other court. The Supreme Court, regarding limitation proceedings, has stated:

> [T]his court has by its rules and decisions given the statute a very broad and equitable construction for the purpose of carrying out its purpose, and for facilitating a settlement of the whole controversy over such losses as are comprehended within it, and that all the ease with which right can be adjusted in equity is intended to be given to the proceeding.[43]

Unlike the situation faced by the district court in *Petition of A/S J. Ludwig Mowinckels,*[44] the instant case involves only two contestants, both of whom are properly before a court of competent jurisdiction. It was within the court's discretion to determine, as it did, that allowing simultaneous prosecution of the same action in a foreign forum thousands of miles away would result in "inequitable hardship" and "tend to frustrate and delay the speedy and efficient determination of the cause."[45] On the facts of the present case, we find no abuse of that discretion.

In accordance with the foregoing, the order of the district court is AFFIRMED.

---

[43] Hartford Accident & Indem. Co. v. Southern P. Co., 273 U.S. 207, 215 (1927).

[44] 268 F. Supp. 682 (S.D.N.Y. 1967), see note 13 *supra*.

[45] *See* Petition of Bloomfield S.S. Co., ——— F.2d ———, (2d Cir), [Nos. 33681, 33947, 34015, Feb. 26, 1970].

WISDOM, Circuit Judge, dissenting.

"Problems arising in a court call for a perceptive awareness not only of what courts are for but of what a legislature is for and sometimes also of what an administrative agency is for *and of what matters can best be left to private decision.*" H. Hart & A. Sacks, The Legal Process iii (tent. ed. 1958) (emphasis supplied).

In this case we deal with an agreement made between two responsible corporations involved in an international transaction. This transaction was no run-of-the-mine project. The subject of the contract was the towing of a six million dollar self-elevating oil drilling barge from the Mississippi to the Adriatic. Unterweser, the tower, is a corporation organized and domiciled in Germany. Zapata, owner of the rig, is a Delaware corporation domiciled in Texas. Zapata solicited bids from several towing companies before engaging Unterweser. Zapata then requested Unterweser to furnish a written contract for its perusal. Unterweser, which generally inserts a provision for German jurisdiction and application of German law, specified an English forum and English law as a reasonable compromise with an American firm in a transaction requiring an oil rig to traverse the Gulf of Mexico, the Atlantic, the Mediterranean, and the Adriatic. After reviewing the suggested contract, Zapata made several changes in the document before executing it. Presumably Zapata could have rejected the contract outright and accepted one of the other bids. Yet the Court holds that these corporations of diverse nationalities, performing a contract in the vicinity of many jurisdictions, could not effectively agree on which forum they would use to regulate their relationship and settle their disputes (probably the best method of ensuring a correct application of the governing law. Reese, The Contractural Forum: Situation in the United States, 13 Am. J. Comp. L. 187, 189 (1964). Inevitably such a holding poses a

serious disability to certainty in the ever-growing international trade. Where contract relations permit advance planning in transnational contracts, "there are evident advantages in such certainty, in avoiding later jurisdictional disputes. Transnational commercial activities would thereby be facilitated". H. Steiner & D. Vagts, Transnational Legal Problems 727 (1968).[1]

If *Carbon Black Export, Inc. v. The SS Monrosa*, 5 Cir. 1958, 254 F.2d 297, *cert. dismissed*, 1959, 359 U.S. 180, requires the result the Court reaches here, then I believe that case is outmoded. The *Carbon Black* Court[2] believed "the universally accepted rule" to be that forum agreements are unenforceable. I cannot tell whether the majority here reads *Carbon Black* at its broadest, that forum agreements are necessarily "contrary to public policy and will not be enforced", 254 F.2d at 301, or at its narrowest, "that a choice of forum clause will not be enforced *unless the selected state would provide a more convenient forum than the*

---

[1] *See* Nadelmann, The Hague Conference on Private International Law & the Validity of Forum Selecting Clauses, 13 Am. J. Comp. L. 157 (1964); Lenhoff, The Parties' Choice of a Forum. "Prorogation, Agreements", 15 Rutgers L. Rev. 414 (1961).

[2] In *Carbon Black*, an American exporter sued both the vessel and the vessel's owner, an Italian corporation, for damage to and nondelivery of a cargo of carbon black placed on board the S.S. Monrosa in the United States for shipment to Italy. The defendant moved for dismissal because of a provision in the contract that any action for loss or damage to the goods should be brought in Genoa. This Court reversed the district court's decision to grant the motion, holding that the in rem action did not come within the language of the forum clause. With respect to the action in personam we stated that "the universally accepted rule [is] that agreements in advance of controversy . . . to oust the jurisdiction of the courts are contrary to public policy and will not be enforced". The Supreme Court at first granted certiorari to resolve an apparent conflict with Wm. H. Muller & Co. v. Swedish American Line, Ltd., 2 Cir. 1955, 224 F.2d 806, *cert. denied*, 1955, 350 U.S. 903, then dismissed certiorari as improvidently granted, finding that the clause in *Carbon Black* did not include an in rem action and refusing to rule on the clause's validity with regard to the in personam action. 359 U.S. 180. *Muller* had said that courts should enforce a forum clause unless it was unreasonable or prohibited by statute.

state in which suit is brought". Reese at 192 (emphasis supplied).[3] Believing as I do that *Carbon Black's* rule

[3]Perhaps the original *Carbon Black* opinion is largely responsible for that ambiguity. After presenting its universal rule, *Carbon Black* stated that it neither espoused nor rejected the Second Circuit's position in *Muller*. *Carbon Black* referred to factual distinctions from Muller which tended to show that the operation of the *Carbon Black* forum clause was less reasonable than *Muller's*, then concluded that the doctrine of forum non conveniens did not justify declining jurisdiction because the balance was not strongly in favor of the defendant. Thus, it is unclear whether the factual distinctions buttress the conclusion that forum non conveniens did not apply, or whether *Carbon Black* was somehow retreating from the universality of its principle. I believe the same ambiguity is reflected in Insurance Company of North America v. N.V. Stoomvaart-Maatschappij "Oostzee", E.D. La. 1961, 201 F. Supp. 76. There the district court concluded that *Carbon Black* required forum clauses to "be stricken herewith as being contrary to public policy and unenforceable", 201 F. Supp. at 78, but proceeded to analyze the reasonableness of the particular clause in the circumstances presented.

There are other indications that this Court has not taken such a harsh view of forum clauses as *Carbon Black* proposes. In Anastasiadis v. S.S. Little John, 5 Cir. 1965, 346 F.2d 281, *cert. denied*, 1966, 384 U.S. 920, for example, we affirmed the district court's decision to decline jurisdiction of an in rem suit. There, a Greek Seaman had contracted in Greece for employment on a vessel of Liberian registry. Although a Liberian corporation owned the vessel, that corporation was in turn wholly owned and controlled by an American corporation, in turn wholly owned and controlled by a United States citizen. The contract, written in Greek, provided that the seaman would join the vessel at Houston, Texas. But it stated that Greek law would govern disputes and designated the Greek courts at Piraeus as the forum. When the seaman joined the ship at Houston, he found conditions unsatisfactory and sued in a Texas district court for breach of contract and tort. Depositions of witnesses ween taken in the United States. This Court concluded that even though the district court undoubtedly had jurisdicion, it also had discretion to decline jurisdiction of a controversy between foreigners. Although a nominal foreign registry is often pierced where American laws are to be enforced against a ship beneficially owned by Americans, the Court declined to do so. It said.

> The contract in the instant case provided not only that Greek law would be determinative but also that the Greek courts were to be the proper forum for the litigation of claims arising out of the contract. We see no reason, in the circumstances of this case, why this provision should not be given effect in the absence of any suggestion in the record that Greece is an inconvenient forum or that Greek law provides an inadequate remedy.

346 F.2d at 284. It is perhaps this less rigorous view of forum clauses and Oostzee's analysis of the unreasonable aspects of the

is erroneous both historically and analytically, however, I must reject both the broad and the narrow formulations as unsatisfactory.[4]

I think the rule should be "outright recognition of the parties' autonomy . . . if tempered by the court's continuing power to refuse effect to 'unreasonable' prorogation [choice of forum] agreements, and subject to specific legislation limiting access to the courts of the forum". A. Ehrenzweig, Conflict of Laws § 41, at 153 (1962). Or, as the Restatement puts it, "[t]he parties' agreement as to the place of the action cannot oust a state of judicial jurisdiction, but such an agreement will be given effect unless it is unfair or unreasonable". Restatement (Second) of Conflict of Laws § 80 (Proposed Off. Draft, 1967).[5]

---

forum clause there that have prompted the observation by some commentators that cases striking down forum clauses in the Fifth Circuit emphasize the "unreasonable character" of the particular clause. *See, e.g.*, Steiner v. Vagts at 734.

[4]Perhaps *Carbon Black* could be distinguished or limited to its facts. The Carriage of Goods by Sea Act, 46 U.S.C. §§ 1300-15, applied there, and the Second Circuit has recently found that § 3(8) of that Act makes forum clauses unenforceable where it applies. Indussa Corp. v. S.S. Ranborg, 2 Cir. 1967, 377 F.2d 200; *accord*, G. Gilmore & C. Black, The Law of Admiralty § 3-25, at 125 n. 23 (1957); 40 U. Col. L. Rev. 159 (1967); 8 Va. J. Int. L. 161 (1967); Note, Enforcement & Effect of the Jurisdiction Clause in Admiralty, 34 St. John's L. Rev. 72, 76-79 (1959). *But see* 9 Harv. Int. L. J. 333, 339-40 (1968); 14 Wayne L. Rev. 609, 614-16 (1968); 45 Corn. L. Q. 364, 372 (1960). *Carbon Black*, moreover, specifically stated that it neither espoused nor rejected *Muller*, a case that enforced a forum clause where there was no evidence of undue bargaining pressure and the clause was not unreasonable. Finally, *Carbon Black* dealt with the specification of an Italian forum for a contract printed in English adopting American law (COGSA) and executed in the United States. But I tend to agree with the majority that *Carbon Black's* language and reasoning, even at their narrowest, are broad enough to cover this case, and I feel that it must be overruled.

[5]The Restatement of Contracts § 558 (1932) is sometimes read the same way, *see* Krenger v. Pennsylvania R.R., 2 Cir. 1949, 174 F.2d 556, 561 (L. Hand, J., concurring), presumably because the Restatement specifies that agreements to litigate in federal rather than state court or vice versa are illegal, but outlaws other

I.

The courts' distaste for forum clauses has usually been linked to a supposed longstanding judicial antipathy to arbitration agreements. Ehrenzweig § 41, at 148. Most judges and commentators have attributed this attitude to "the contests of the different Courts in ancient times for extent of jurisdiction, all of them being opposed to anything that would altogether deprive every one of them of jurisdiction". *Scott v. Avery*, 5 H. L. Cas. 811, 853, 40 Rev. R. 392, 413 (1856) (Lord Campbell): But more recently scholars have demonstrated that the supposed antagonism to arbitration agreements was not so entrenched and that its apparent cause, the desire for fees, was erroneously ascribed. 6A A. Corbin, Contracts § 1433, at 391-95 (1962);

---

agreements limiting the tribunal only if they do so "unreasonably".

The presumption quoted in text from the Restatement of Conflicts has changed since an earlier draft. In 1957 the comparable section read:

> The parties' agreement as to the place of suit cannot prevent the exercise of judicial jurisdiction by a State. A provision to this effect will, however, be given effect by a court if it is deemed fair and reasonable.

Restatement (Second) of Conflict of Laws § 117a (Tent. Draft No. 4 1957).

The Comment to the present § 80 is a useful synopsis of my position in this dissent. As the rationale for § 80, it states:

> Private individuals have no power to alter the rules of judicial jurisdiction. They may not by their contract oust a state of any jurisdiction it would otherwise possess. This does not mean that no weight should be accorded a provision in a contract that any action thereon shall be brought only in a particular state. Such a provision represents an attempt by the parties to insure that the action will be brought in a forum that is convenient for them. A court will naturally be reluctant to entertain an action if it considers itself an inappropriate forum. And the fact that the action is brought in a state other than that designated in the contract affords ground for holding that the forum is an inappropriate one and that the court in its discretion should refuse to entertain this action. Such a provision, however, will be disregarded if it is the result of overreaching or of the unfair use of unequal bargaining power or if the forum chosen by the parties would be a seriously inconvenient one for the trial of the particular action. On the other hand, the provision will be given effect, and the action dismissed, if to do so would be fair and reasonable.

Ehrenzweig § 42, at 153 & n. 26; Sayre, Development of Commercial Arbitration Law, 37 Yale L. J. 595 (1928).[6] Instead, until the Statute of Fines and Penalties, 8 & 9 Wm. III (1687), made the remedy impractical, courts consistently enforced arbitration agreements through the vehicle of penal bonds. With this remedy gone, pressure mounted to make arbitration agreements irrevocable. The courts resisted not on account of the fees involved, but because "arbitration proceedings were not regulated and the parties' only effective protection against an unfair or insufficient hearing by the arbitrators was in revoking the submission before the award was given". Sayre at 605.[7] Not until the nineteenth century was the revocability of arbitration agreements simply premised on the courts' opposition to "ouster" from their jurisdiction. Ehrenzweig § 42, at 155.[8] And then legislative action both in England and in the United States encouraged the courts to take a more benevolent view of such agreements.[9]

The strength of this misconception, however, seems to have contributed to American courts' generally negative attitude toward forum clauses. *Home Insurance*

---

[6]If ever there had been any substance to the fees argument, it should have no force in our Circuit where we are faced with crowded and constantly growing dockets (especially since we are not paid by the case).

[7]*Cf.* 6A Corbin, § 1433, at 391-95. Forum clauses are sometimes referred to as preferable in this respect, because a judicial remedy is still available. Ehrenzweig, § 42, at 152.

[8]Sayre at 604 identifies an eighteenth century case, Kill v. Hollister, 1 Wils. 129 (1746) as the first case actually to speak in these terms, but the majority of cases were later.

[9]Common Law Procedure Act of 1954, 17 & 18 Vict., c. 125, § 11 (permitting use of the courts' discretion); Arbitration Act of 1889, 52 & 53 Vict. c. 49; Georgia Arbitration Act, Ga. Laws 1855-56, 222-24. Action in the United States did not become significant until after Judge Hough's sardonic opinion in United States Asphalt Ref'g Co. v. Trinidad Lake Petroleum Co., S.D.N.Y. 1915, 222 Fed. 1006. *See* Sayre at 612. But that opinion prompted enactment of arbitration statutes. *See e.g.*, Gilbert v. Burnstine, 1931, 255 N.Y. 348, 174 N.E. 706, 707: "Settlements of disputes by arbitration are no longer deemed contrary to our public policy. Indeed, our statute encourages them."

Company v. Morse, 1874, 20 Wall. (87 U.S.) 445, 22 L.Ed. 365, 368, concluded that the authorities showed agreements in advance to oust the courts of jurisdiction conferred by law [to be] illegal and void". The Court quoted at length from *Scott v. Avery* and from Mr. Justice Story's Commentaries on Equity Jurisprudence (§ 670) that

> where the stipulation, though not against the policy of the law, yet is an effort to devest the ordinary jurisdiction of the common tribunals of justice, such as an agreement in case of dispute to refer the same to arbitration, a court of equity will not any more than a court of law interfere to enforce agreement . . . .[10]

In truth, however, courts had not uniformly disfavored forum clauses. Decisions enforcing the parties' designation of a forum date back to 1796. *Gienar v. Meyer,* 126 Eng. Rep. 728 (C.P. 1796) (Dutch seaman suing Dutch seamaster for wages in English court; *held,* ship's articles specifying the code of Rotterdam and the courts of Holland were enforceable). They continue through the nineteenth century despite the fear of "ouster". Indeed, the example of arbitration influenced the English courts to deal kindly with forum clauses. *Law v. Garrett,* 8 Ch. D. 26 (C.A. 1878), for example, spoke in terms of arbitration in a case involving the stipulation of a Russian court in St. Petersburg.

---

[10]The heart of *Morse* was the constitutional issue of the line between state and federal jurisdiction. A Wisconsin statute required that before doing business in the state, all foreign corporations must sign agreements not to remove a suit from state to federal court. The Home Insurance Company filed the agreement, but when sued, attempted to remove the case to federal court. The Wisconsin courts refused to allow removal. The United States Supreme Court reversed on the ground that a state had no constitutional power to compel a surrender of the right of removal to federal court. The observation that even without the statute such an agreement was void appears to be surplusage. The more compelling argument against enforcing the clause was the fact that an unconstitutional condition was being imposed. Since the alternative was prohibition against doing business in Wisconsin, the contract could also be characterized as one of adhesion. We do not face the *Morse* constitutional argument in this case.

Lord Justice Baggallay observed that the court entirely agreed with *Willesford v. Watson,* L.R. 8 Ch. 473 (1870), that where "parties choose to determine for themselves that they will have a forum of their own selection instead of resorting to the ordinary Courts, a *prima facie* duty is cast upon the Courts to act upon such arrangement". 8 Ch. D. 26, 37. The agreement did not "oust" the court of jurisdiction, but did give it discretion to stay the proceedings. The English courts have continued to follow the principle of *Law v. Garrett.*[11] Today their rule appears to be enforcement of a forum clause unless the particular case militates against it. The Vestris, 43 Lloyd's List L.R. 86 (Adm. Div. 1932). "[A] forum selection agreement will, *prima facie,* be respected; the burden of proof lies upon the party resisting the application for a stay; and he must convince the court that a stay should be granted." Cowen & Mendes da Costa, The Contractual Forum: Situation in England & the British Commonwealth, 13 Am. J. Comp. L. 179, 186 (1964).

American courts, however, have generally retained their hostility to forum agreements. If the law is to be applied simply by tallying up the number of precedents that have not been overruled, then the majority opinion here is undoubtedly correct.[12] But important incursions have been made. In 1949, Judge Learned Hand observed:

---

[11] *See, e.g.,* Austrian Lloyd Steamship Co. v. Gresham Life Ass. Soc'y [1903] 1 K.B. 249 (C.A.); Kirchner & Co. v. Gruban, [1909] 1 Ch. 413 (1908); The Media, 41 Lloyd's List L.R. 80 (Adm. Div. 1931).

For a discussion of the law on forum clauses in the British Commonwealth see Cowen and Mendes do Costa, The Contractual Forum: A Comparative Study, 43 Can. Bar Rev. 453 (1965). For other countries, *see generally* The Validity of Forum Selecting Clauses: Proceedings of the 1964 Annual Meeting of the American Foreign Law Association, 13 Am. J. Comp. L. 157 (1964); Lenhoff, The Parties' Choice of a Forum: "Prorogation Agreements", 15 Rutgers L. Rev. 414 (1961).

[12] Many of the cases are cited at Annot., 56 A.L.R.2d 300 (1957) (and Later Case Service, 1967). In 1950 it was said of the few cases that enforced a forum clause, "they stand alone, separate and apart, branded with the malodorous antipathy of a bastard child at a family reunion of bluebloods". Comment, Agreements in Advance Conferring Exclusive Jurisdiction on Foreign Courts, 10 La. L. Rev. 293, 297 (1950).

> In truth, I do not believe that, today at least, there is an absolute taboo against such contracts at all; in the words of the Restatement [of Contracts § 558], the are inavlid only when unreasonable. . . . What remains of the doctrine is apparently no more than a general hostility, which can be overcome, but which nevertheless does persist.

Krenger v. Pennsylvania Railroad, 2 Cir. 1949, 174 F.2d 556, 561 (concurring opinion). In 1951, the Second Circuit enforced a forum clause specifying Norwegian courts. *Cerro de Pasco Copper Corporation v. Knut Knutsen,* 2 Cir. 1951, 187 F.2d 990.[13] And in 1955 it went one step farther in destroying the hostility, holding in *Wm. H .Muller & Company v. Swedish American Lines, Ltd.,* 2 Cir. 1955, 224 F.2d 806, *cert. denied,* 1955, 350 U.S. 903, that courts should enforce a forum clause in an international contract unless it was unreasonable or prohibited by statute.[14] I must disagree with the ma-

---

[13]Although Cerro de Pasco was a New York corporation, the district court found that it was "like an assignee" of a Belgian corporation and that the controversy was therefore really between aliens. S.D.N.Y. 1950, 94 F. Supp. 60, 61. The Second Circuit, however, did not refer to this argument. It dealt specifically with the issue whether an American court could decline jurisdiction of an American plaintiff and held that the forum clause made Swift & Co. Packers v. Compania Colombiana, 1950, 339 U.S. 684, S.Ct. , 95 L.Ed. 1206 *(see* discussion in section III, *infra),* inapposite.

[14]In *Muller* a New York corporation sued in a New York federal court to recover the value of a cargo of cocoa beans lost in transit between Sweden and Philadelphia. The district court dismissed the suit because a clause in the bill of lading provided that any claims against the vessel's owner, a Swedish corporation, should be decided according to Swedish law and in the Swedish courts. The Second Circuit affirmed, holding first that the forum clause was not contrary to COGSA because its application would not result in a "lessening" of the "liability" imposed upon the defendant by the Act; second, that a forum clause should be enforced unless unreasonable or contrary to statute. The clause in question was not unreasonable because "most of the evidence as to unseaworthiness will be more readily available in a Swedish court"; all members of the crew resided in Sweden and the vessel had been built in that country; and, "for aught that appears", the parties' consent to inclusion of the clause in the bill of lading was "freely given".

jority's conclusion that *Indussa Corporation v. S.S. Ranborg*, 2 Cir. 1967, 377 F.2d 200,[15] overrules this part of *Muller, Indussa's* decision not to enforce a forum clause derived from its view that the Carriage of Goods by Sea Act, 46 U.S.C. §§ 1300-15, where applicable, prohibited such clauses. COGSA did apply to *Muller* (as it did to *Carbon Black*) and for that reason *Muller* was overruled. "[T]he *Muller* court leaned too heavily on general principles of contract law and gave insufficient effect to the enactments of Congress governing bills of lading . . . ." 377 F.2d at 202. Where COGSA does not apply as in this case, I believe Muller's "general principles of contract law" still lead to *Muller's* result.[16]

In 1965, the Pennsylvania Supreme Court enforced a forum clause between two American parties specifying New York courts. The Pennsylvania court started with the proposition that private bargaining could not change statutory rules of jurisdiction or venue.

---

[15] In *Indussa* a New York corporation sued the vessel because a cargo of nails and barbed wire arrived in San Francisco, from Antwerp, Belgium, rusted and depreciated in value. The district court dismissed the suit on the basis of a clause specifying the carrier's principal place of business (Norway) as the forum.

[16] Judge Friendly's remarks about the consequences of sending an American to a foreign forum must be read in the context of his concern accurately to comply with a statute prohibiting contract terms that lessen liability. If they go beyond that, I must agree with Judge Moore's special concurrence that it is "singularly inappropriate for our courts to say, in effect, that the courts of all other nations are so unable to dispense justice that as a matter of public policy, we must protect our citizens by outlawing any other tribunal than our own". 377 F.2d at 205. That they do not I am convinced by Judge Friendly's rejoinder: "we do not 'outlaw any other tribunal than our own' as our brother Moore suggests; we hold merely that Congress outlawed clauses prohibiting American courts from deciding causes otherwise properly before them". *Id.* at 204. I observe, however, that the concern that expenses in going to a foreign court may outweigh an American's modest claim tends to ignore the other side of the coin, that a foreign national's expenses in coming to the United States may outweigh the value of asserting a legitimate defense to the modest claim. It will not do to say in these cases that part of the contract has American ties, for part of the contract has foreign ties. Properly designed forum clauses can deal with such circumstances and arrive at a fair compromise.

> However, we do not agree with these cases to the extent that they hold that an agreement between the parties, purporting to determine the forum where future disputes between them should be litigated, is *per se* invalid and without legal effect. The modern and correct rule is that, while private parties may not by contract prevent a court from asserting its jurisdiction or change the rules of venue, nevertheless, a court in which venue is proper and which has jurisdiction should decline to proceed with the cause when the parties have freely agreed that litigation shall be conducted in another forum and where such agreement is not unreasonable at the time of litigation.

Central Contracting Company v. C. E. Youngdahl & Company, 1965, 418 Pa. 122, 209 A.2d 810, 816.

The Third Circuit, confronted with the same forum clause the next year, concluded that

> both federal and state courts have increasingly in recent years recognized the same principle which the Supreme Court of Pennsylvania has now adopted. It is becoming more widely recognized that for reasons of business or convenience the parties may have bargained that all litigation arising out of their complex activity under a contract shall be drawn into one jurisdiction. So long as there is nothing unreasonable in such a provision there is no basis for viewing it as an affront to the judicial power, which must be stricken down. On the contrary, it should be respected as the responsible expression of the intention of the parties so long as there is no proof that its provisions will put one of the parties to an unreasonable disadvantage and thereby subvert the interests of justice.

Central Contracting Company v. Maryland Casualty Company, 3 Cir. 1966, 367 F.2d 341, 344-45.[17]

[17]The Supreme Court may have expressed approval of forum clauses in an interstate context in National Equipment Rental v. Szukhent. 1964, 375 U.S. 311, 315-16, 84 S.Ct. 411, 11 L.Ed. 2d

This very cursory review indicates that an unqualified judicial opposition to forum and arbitration clauses has at best only weak historical antecedents. Neither arbitration nor forum clauses were the subject of such opprobrium as has popularly been supposed. Concern there was, but not a universal rule that such clauses were void. And despite American courts' general disregard of forum clauses, significant dissenting views have been registered.[18]

II.

A search for policies to buttress the wholesale invalidation of forum clauses is likewise unsuccessful. Chief Justice Shaw of Massachusetts tried to formulate

---

354, 357-58. In dealing with a contract clause designating an agent for service of process, the Court said:

> The purpose underlying the contractual provision here at issue seems clear. The clause was inserted by the petitioner and agreed to by the respondents in order to assure that any litigation under the lease should be conducted in the State of New York. . . . And it is settled . . . that parties to a contract may agree in advance to submit to the jurisdiction of a given court. . . .

Szukhent is not significant authority, however, because the Court there was faced with the question whether New York courts had jurisdiction, not whether other courts should decline jurisdiction. Justice Black, dissenting, reads *Szukhent* more broadly: "Here this contract as effectively ousts the Michigan courts of jurisdiction as if it had said so. Today's holding disregards Michigan's interest in supervising the protection of rights of its citizens who never leave the State but are sued by foreign companies with which they have done business". 375 U.S. at 327, 11 L.Ed. 2d at 364-65.

[18] Earlier cases foreshadowed these results. Gilbert v. Burnstine, 1931, 255 N.Y. 348, 174 N.E. 706, hold that a New York citizen's agreement to arbitrate in England should be enforced. The New York court concluded that these agreements were not contrary to public policy, and "[c]ontracts made by mature men who are not wards of the court should, in the absence of potent objection, be enforced. 174 N.E. at 707. Mittenthal v. Mascagni, 1903, 183 Mass. 19, 66 N.E. 425, enforced a forum clause designating Italian courts. Although the plaintiffs were New York citizens, the contract conferred Italian domicile upon them. Therefore, the court spoke of the contract as "between citizens of foreign states" and found no public policy to prevent enforcing it. For a collection of recent cases enforcing forum clauses see Annot., *supra* note 12.

the arguments in 1856, recognizing then that history afforded "no authority upon which to determine the case". *Nute v. Hamilton Mutual Insurance Company*, 72 Mass. (6 Gray) 174, 185 (1856). He reasoned first that

> [t]he rules to determine in what courts and counties actions may be brought are fixed, upon considerations of general convenience and expediency, by general law; to allow them to be changed by the agreement of parties would disturb the symmetry of the law, and interfere with such convenience.

Id. at 184. This symmetry and convenience argument bears doubtful relevance to the intrastate venue problems involved in Nute.[19] On the international scene, it is simply inapplicable. Reese at 188. No general law fixes venue among the nations and states, only individual jurisdictional rules and happenstance. Convenience and expedience can more successfully be served by duly considered forum agreements fairly bargained for and enforceable.

> Shaw's second concern was that forum contracts might be induced by considerations tending to bring the administration of justice into disrepute; such as the greater or less intelligence and impartiality of judges, the greater or less integrity and capacity of juries, the influence, more or less, arising from personal, social or political standing of parties in one or another county.

Id. at 184. To the extent this argument is a real concern, it appears less pertinent to an international context than to intrastate venue problems where parties might more easily exert influence on local adjudicators. If it is a problem, however, wholesale prohibition of forum clauses is an excessive response. An inquiry that takes

---

[19]See Daley v. People's Bldg., Loan & Sav. Ass'n., 1901, 178 Mass. 13, 59 N.E. 452 (Holmes, C.J.: *Nute* obviously was "a somewhat hesitating decision", not to be extended; *held*, contractual stipulation of New York forum was enforceable).

this factor into account where it arises would adequately meet that concern. The best comment about Shaw's policy arguments is his own: "these considerations are not of much weight" and "no great reliance" deserves to be placed upon them. *Id.* at 184.

The greatest inconvenience to the Massachusetts Chief Justice's mind was

> requiring courts and juries to apply different rules of law to different cases, in the conduct of suits, in matters relating merely to the remedy, according to the stipulation of parties in framing and diversifying their contracts in regard to remedies.

Id. Of course consistent enforcement of a forum stipulation need not produce confusion. Shaw's real objection was rooted in his belief that the parties to a contract could not make terms with regard to their remedy; that was a matter only the courts could decide. *Id.* at 180-81. Although the distinction between sustantive rights and remedies may well exist, the breadth of the principle as Shaw saw it has been subjected to serious challenge, Ehrenzweig § 41, at 149,[20] and in the case of arbitration statutes, overruled.

> [G]enerally, all stipulations made by parties for the government of their conduct, or the control of their rights, in the trial of a cause, or the conduct of a litigation, are enforced by the courts.
>
> . . . [I]t is not true that parties cannot enter into stipulations which in some sense will bind and control the action of the courts. They do not literally control the power of the courts except as such power is in all cases circumscribed by the necessity which obliges every court to apply the proper rules of law to the facts of every case, and to exercise its powers according to established principles.

---

[20] *See* 6A Corbin § 1432, at 386 n. 76 & § 1434, at 397.

In re New York, Lackawanna & Western Railroad Company, 1885, 98 N.Y. 449, 453, 62 N.Y.S. 522, 523-24. It may be that some questions of remedy are less amenable to private settlement than are questions of primary rights and obligations. But the specific question still unanswered is whether forum clauses are thus an inappropriate subject for private ordering.

This Court was no more successful in marshalling arguments to support its conclusion in *Carbon Black*. We simply relied on authority as characterized by Corpus Juris Secundum and American Jurisprudence to opine that forum agreements are "contrary to public policy". That of course "is the conclusion to be proved rather than proof for the conclusion". Ehrenzweig, § 41, at 149. Our apparent concern that such agreements attempted to "oust" us of jurisdiction was ill-considered. The majority here correctly points out that jurisdiction is not an issue. The question is whether a court possessing jurisdiction should for good and sufficient reasons decline to exercise it. But since the bogey of jurisdictional ouster infuses so much of the opposition to forum clauses and since it infuses the *Carbon Black* rule to which the Court pays obeisance today, it is necessary to lay it to rest. There are various ways to do so. For example, "[i]f the agreement is enforced, it cannot truly be said that jurisdiction has been conferred or ousted by the parties. Jurisdiction is exercised or withheld only by force of the law that gives effect to the parties' agreement", Perillo, Selection Forum Agreements in Western Europe, 13 Am. J. Comp. L. 162 (1964); *accord, In re New York, Lackawanna & Western Railroad Company*, 1885, 98 N.Y. 449, 453, 62 N.Y.S. 533, 534. If that formulation does not persuade the fearful we can follow the example of the Netherlands. There "the courts recognize that the parties have no power to modify the rules of jurisdiction. Nevertheless, the courts refuse to participate in a breach of contract. Consequently, they refuse to take cognizance of a case in violation of the parties' agreement." Perillo at 165; *accord, Racehorse Betting Control Board v. Secretary for Air*, [1944] 1 Ch. 114, 126 (C.A. 1943).

In summarizing the English view, Lord Denning couches it in these terms:

> I do say that the English courts are in charge of their own proceedings: and one of the rules they apply is that a stipulation that all disputes should be judged by the tribunals of a particular country is not absolutely binding. It is a matter to which they will normally give effect, but it is subject to the overriding principle that no one by his private stipulation can oust these courts of their jurisdiction in a matter that properly belongs to them.

The Fehmarn, [1958] 1 Weekly L.R. 159, 161-62 (C.A. 1957). Finally a federal judge has concluded:

> With th[e] proposition [that the parties cannot oust a court of jurisdiction] there can be no quarrel. However, the very fact that it is so well established tends to reduce its value, since parties to an exclusive forum arrangement are unlikely to intend a purpose which they must realize cannot be achieved. Therefore, in drafting their agreement they would normally mean not to deprive some courts of jurisdiction but to express their desire that these courts relinquish jurisdiction in deference to what was at least originally the belief that suits could be better or more conveniently tried someplace else.

Geiger v. Keilani, E.D. Mich. 1967, 270 F. Supp. 761, 765 (Freeman, C.J.).[21]

I cannot believe that jurisdictional ouster is a real issue. We are willing to dismiss a suit of which we have jurisdiction if it is between aliens.[22] And federal courts have not been chary of "losing jurisdiction" in other areas. In habeas corpus cases from state courts, federal

---

[21] Compare Judge Frank's statement in *Knut Knutsen*: "It might be said that the court took jurisdiction and granted specific performance . . . ." 187 F.2d at 991 n. 1.

[22] *See Anastasiadis, supra* note 3; Burt v. Isthmus Dev't Co., 5 Cir. 1955, 218 F.2d 353, 356, *cert. denied*, 1955, 349 U.S. 922.

courts decline to exercise jurisdiction until a prisoner has exhausted state remedies. The exhaustion doctrine, now codified, 28 U.S.C. § 2254(b), was characterized not as a jurisdictional bar, but as an argument of comity — to decline, in favor of state courts, jurisdiction that we possessed. *Fay v. Noia,* 1963, 372 U.S. 391, 418, 83 S.Ct. 822, 9 L.Ed.2d 837, 856-57. The abstention doctrine is similar. "Abstention allows a federal court whose *jurisdiction has been properly invoked* to postpone decision, pending trial in a state court, when the result might turn on issues of state law." Note, Federal - Question Abstention: Justice Frankfurter's Doctrine in an Activist Era, 80 Harv. L. Rev. 604 (1967) (emphasis supplied).[23] The doctrine of forum non conveniens has also allowed a court with jurisdiction of a suit to refuse to hear the controversy where a more convenient forum is available. *Gulf Oil Corporation v. Gilbert,* 1947, 330 U.S. 501, S.Ct. , 91 L.Ed. 1055. If in all these cases we can recognize that other policies militate against the formal notion that once we have jurisdiction we must exercise it, surely we can undertake the task which *Carbon Black* neglected, of weighing the arguments against forum clauses. It is time to lose our fixation with the ancient notion of physical power — that because a tort occurs within this Court's "mare nostrum" we would be derelict not to decide the case.[24]

III.

What does emerge from the history, the cases, and the commentary is a legitimate concern for the bargaining conditions in which the forum agreement was

[23] *See* Reetz v. Bozanich, 1970, U.S. , 90 S.Ct. 25 L.Ed.2d 68.

[24] Other attempts to justify the broad rule against forum clauses have been no more successful. Attempts to distinguish arbitration by observing that arbitration "was not a limitation on the forum, but rather was an agreement to eliminate the need for any forum whatever", Bergman, Contractual Restrictions on the Forum, 48 Calif. L. Rec. 438, 439 (1960), are simply not convincing. The argument that a party's choice of forum is a substantial right not to be bartered away, *id.* at 328-29; *Morse, supra,* 22 L.Ed. at 368, is conclusory like the *Carbon Black* statement that forum clauses are against public policy. Neither position gives reasons why it should be accepted.

made and the quality of the remedy available to the parties if the agreement is enforced. These two concerns encompass several relevant factors that have been isolated. (1) Did the parties freely and intelligently enter their agreement? In contracts of adhesion, where one party possessed overweening bargaining power or where there was no opportunity to negotiate the terms, and of course where fraud has occurred, courts are unwilling to deny a plaintiff his forum on the basis of the contractual stipulation.[25] (2) Would the stipulated forum in rendering its decision transgress an important public policy of the present forum? In cases of bankruptcy, divorce, successions, real rights, and regulation of public authorities, for example, courts cannot remit the dispute to a foreign forum lest a foreign court render a decree conflicting with our ordering of these affairs.[26] And in cases where objectionable activity within our jurisdiction would be encouraged by the foreign court's decree, we would reach a similar result. *Cf.* The Kensington, 1902, 183 U.S. 263, S.Ct. , 46 L.Ed. 190. (3) Will the designated forum adjudicate the parties' dispute? A court may postpone declining jurisdiction until it is sure the foreign court will hear the dispute and provide a remedy. *See, e.g., Swift & Company Packers v. Compania Colombiana,* 1950, 339 U.S. 684, 697-98, S.Ct. , 94 L.Ed. 1206, 1215. (4) Is the designated forum seriously inconvenient for the trial of the action? Since we recognize in the doctrine of forum non conveniens that a jurisdictionally selected forum should sometimes give way to another in the face of strong arguments of convenience, it would be anomalous to ignore those considerations where the parties have selected a forum without the benefit of hindsight.

---

[25] This may be a better rationale for cases that refuse to enforce forum clauses in passenger and baggage tickets, *See, e.g.,* Muoio v. Italian Line, E.D.Pa.1964, 228 F. Supp. 290; Note, Validity of Contractual Stipulation Giving Exclusive Jurisdiction to the Courts of One State, 45 Yale L. J. 1150 (1936).

[26] *See* Article 3, Draft of a Convention on the General Jurisdiction of Contractual Forums Adopted by the Ad Hoc Committee, December 20, 1963, The Hague Conference on Private International Law, 13 Am. J. Comp. L. 160 (1964).

This list is not exhaustive but is exemplary of relevant considerations. But since these concerns can be isolated and since forum clauses can provide such a clear benefit of certainty in international trade, we should be satisfied to apply these concerns to individual cases rather than reject all forum agreements. The burden of proof should be on the party objecting to the designated forum to support his objections. *Maryland Casualty*, 367 F.2d at 345; *Youngdahl*, 209 A.2d at 816. The fourth factor in particular must not become just another label for the doctrine of forum non conveniens. It is essential to remember that the parties expressed in their agreement the judgment that on balance a particular forum was most convenient for trial of their disputes.[27] The burden should rest upon the party objecting to that forum to show a significant balance of greater inconvenience in litigating in the designated forum.

The majority has intimated that the forum clause at issue here would fail to qualify even under this more 'charitable approach, and holds that the factors in this case justify the district court's discretionary refusal to disturb the plaintiff's choice of forum. If the test I advocate is the correct one, however, there was no proper exercise of discretion by the district court. That court's memorandum order demonstrates that it invalidated the forum clause under *Carbon Black* and then, ignoring the forum clause, declined to dismiss on a forum non conveniens theory.[28] The district court's conclusion, apart from the authority of Carbon Black, was that "[t]he balance of conveniences here is not

---

[27] *Youngdahl*, *supra* note 45, at 816: "Mere inconvenience or additional expense is not the test of unreasonableness since it may be assumed that the plaintiff received under the contract consideraion for these things."

[28] The district court cited *Muller*, but its analysis clearly placed the burden on the defendant to justify the transfer, as is proper under a forum non conveniens approach. The court relied on Mobile Tankers Co. v. Mene Grande Oil Co., 3 Cir. 1966, 363 F.2d 611, *cert. denied* 1966, 385 U.S. 945, for its criteria, that "[u]nless the balance is strongly in favor of the [Respondent], [the libellant's] choice of forum should rarely be disturbed.' "

strongly in favor of Defendant and Plaintiff's choice of Forum should not be disturbed". A proper approach to a forum clause should reverse that burden. It is a truism that we do not observe an exercise of discretion that was misled by an erroneous view of the law. And to dispel any notion that this forum clause was unreasonable as a matter of law, I canvass the factors I have suggested.

(1) Zapata has neither presented evidence of nor alleged fraud or undue bargaining power in the agreement. Unterweser was only one of several companies bidding on the project. No evidence contradicts its Managing Director's affidavit that it specified English courts "in an effort to meet Zapata Off-Shore Company half way." Zapata's Vice President has declared by affidavit that no specific negotiations concerning the forum clause took place. But this was not simply a form contract with boilerplate language that Zapata had no power to alter. The towing of an oil rig across the Atlantic was a new business. Zapata did make alterations to the contract submitted by Unterweser. The forum clause could hardly be ignored. It is the final sentence of the agreement, immediately preceding the date and the parties' signatures. Perhaps more evidence could be accumulated, but under this evidence Zapata has not met the burden of showing that it was pressured into the forum stipulation.

(2) I conclude that the English courts would provide an adequate remedy and would contravene no important American public policy. In dealing with forum non conveniens, the majority intimates that the district court's discretion to decline jurisdiction was limited because Zapata is an American citizen and the English courts would violate our public policy. The towage contract provided:

1. * * *

> Urag [Unterweser], their masters and crews are not responsible for defaults and/or errors in the navigation of the tow.

2. * * * *

b) Damages suffered by the towed object are in any case for account of its Owners.

On the premise that the English courts would apply English law rather than American in this situation and upon the affidavit of Zapata's English law expert that English courts will enforce the contract, the majority concludes that our policy against enforcing exculpatory clauses might be violated if the controversy proceeded to England.

Of course if Zapata had chosen to abide by the contractual stipulation of forum the case would have proceeded in England and we would have had no opportunity to enforce this public policy. But beyond that, we should be careful not to over-emphasize the strength of the policy. According to *Bisso v. Inland Waterways Corporation*, 1955, 349 U.S. 85, 91, 75 S.Ct. 629, 99 L.Ed. 911, 918,[29] two concerns underlie the rejection of exculpatory agreements: that they may be produced by overweening bargaining power; and that they do not sufficiently discourage negligence. *Bisso* applied these concerns to towage contracts in admiralty jurisdiction. Yet when we sit in diversity we will enforce an exculpatory clause in favor of a railroad. *Seaboard Coast Line Railroad Company v. Tennessee Corporation*, 5 Cir. 1970, 421 F.2d 970. Neither there nor in the case of insurance contracts do the dangers strike us as so serious that federal courts cannot enforce the state law. The question here is whether the fact that a towage contract is involved and the fact that we are sitting in admiralty require us to outlaw a forum that might enforce exculpatory clauses. I believe the policy is not so strong. *Bisso*

---

[29] Dixilyn Drilling Corp. v. Crescent Towing & Salvage Co., 1963, 372 U.S. 697, 83 S.Ct. 967, 10 L.Ed.2d 78, reversed per curiam our enforcement of a towage clause assigning all liability to a barge owner solely on the authority of two earlier companion cases, *Bisso*, and Boston Metals Co. v. S/S "Winding Gulf", 1955, 349 U.S. 122, 75 S.Ct. 649, 99 L.Ed. 933. Since *Winding Gulf* was also decided on the authority of *Bisso*, *Bisso* appears to be the determining authority.

depends less on the questions of public policy involved than on the long line of authority which it believed established a federal rule barring enforcement of such contracts.[30] Although the question has been settled by the Supreme Court for federal courts, we would unduly extend its scope in refusing to enforce a forum clause simply because a foreign forum may enforce an exculpatory clause. Here the conduct in question is that of a foreign party occurring in international waters outside our jurisdiction. The evidence disputes any notion of overreaching in the contractual agreement. And for all we know the uncertainties and dangers in the new field of transoceanic towage of oil rigs were so great that the tower was unwilling to take financial responsibility for the risks, and the parties thus allocated responsibility for the voyage to the tow.[31] It is equally

---

[30] *Bisso* was only a four-Justice opinion. The fifth, Justice Douglas, concurred only because he professed ignorance of the "economics and organization of this business". He admitted that the Court's rule might be "outmoded" and in need of change, that the tugboat industry might be "less able to carry the risks of . . . losses than its customers, and that it might be "fairer in the long run" to allow the tugboat operator transfer liability. But in the absence of a record that threw light on those "large questions of policy", he was unwilling to change what he considered an already established rule in the federal courts. Justice Frankfurter, joined by Justices Reed and Burton, wrote a telling dissent seriously questioning the Court's use of its authorities and reaching the conclusion that the courts should not intervene to upset the arrangements of private parties where there was no evidence of inequality of bargaining power or of concentrated ownership or of unavailability of services by other tugs who would not require exculpatory clauses. In Frankfurter's words, the argument that irresponsibility would be stimulated "has little force, unless we are prepared also to forbid the tug to insure against such losses or liabilities". 349 U.S. at 119, 99 L.Ed. at 932.

[31] Compare our argument in Seaboard Coast Line R.R. v. Tennessee Corp., 5 Cir. 1970, 421 F.2d 970, 974: An exculpatory clause "merely means that if such an injury occurs the parties need not undertake to go to battle to determine whose negligent act, if in fact there was negligence at all, produced the injury . . . . In effect, it seems to us, that in light of the relation of the parties here, the railroad company was simply not willing to permit conjunctive use of railroad equipment by an industrial concern which may well be presumed not to have the same skill in operation of railroad equipment as the railroad company itself without requiring of the industry that it assume absolute liability with respect to any injuries resulting therefrom".

possible that the contract price took this factor into account. I conclude that we should not invalidate the forum selection clause here unless we are firmly convinced that we would thereby significantly encourage negligent conduct within the boundaries of the United States.[32] At the very least, before excluding the forum clause, we should remand to the district court for compilation of a record dealing with the economic relationships in this industry and the consequences of enforcing forum clauses in this international context.

Zapata's American citizenship may very well be an argument in some cases for refusing to decline jurisdiction on the basis of forum non conveniens.[33] *Swift & Company Packers v. Compania Colombiana,* 1950, 339 U.S. 684, S.Ct. , 94 L.Ed. 1206, decided on forum non conveniens principles (no forum clause was mentioned) that it would not deny an American citizen his American forum primarily because there was no assurance that the defendant would appear with adequate security in the foreign court. Here, of course, Unterweser and Zapata have already joined argument in the English courts, the English courts have ruled that they have jurisdiction, and Unterweser has offered to post the same security that is available to Zapata here. The

---

[32]It is true that The Kensington, 1902, 183 U.S. 263, 46 L.Ed. 190, holds that federal courts are not to enforce a foreign law against our public policy where part of a contract is executed in the United States. But in *The Kensington* the defendant was a New Jersey corporation and thus a logical object of regulation by American courts. Here we deal with a foreign national operating at the time of the mishap outside our jurisdiction. In this context, I believe it is not a semantic argument to contend that enforcement of a forum clause is sufficiently attenuated from enforcement of substantive law contrary to our public policy that we do not run afoul of *The Kensington.*

Lest it be thought I thus throw open a route for United States towage contracts to escape the rule of *Dixilyn,* I observe that where both parties are American, and the tow is performed here, it is difficult to see how the towee could fail to prove a foreign forum clause unreasonable. Whether a foreign tower who suffered a mishap while operating within our jurisdiction could take advantage of a forum clause remitting him to a more favorable forum I need not now decide.

[33]*See* Annot., 48 A.L.R. 2d 800 (1956) (and Later Case Service).

Supreme Court in Swift, moreover, expressly declined to decide the "abstract question whether United States admiralty courts may decline jurisdiction over libels brought by United States citizens". 339 U.S. at 697, 94 L.Ed. at 1215. In this case we deal with a situation where Zapata voluntarily and specifically surrendered in the contract its right to proceed in American courts. *See Cerro de Pasco Copper Corp. v. Knut Knutsen*, 2 Cir. 1951, 187 F.2d 990, 991 (*Swift* "inapposite" in context of a forum clause). A proper solicitation for the interests of American citizens may militate in favor of enforcing these clauses. Otherwise, Americans who wish to contract with foreign nationals and who are willing to accept a forum clause will have difficulty in convincing the foreign party that he can rely on the agreement.[34]

(3) The availability of the English forum is certain. Soon after Zapata brought its action in the district court, Unterweser moved that court to decline jurisdiction and initiated proceedings for breach of contract and moneys due in the High Court of Justice, London, England, as the forum provision directs. Zapata appeared in the London court and moved to dismiss the summons on three grounds: that the English court was not a convenient forum; that proceedings between the parties were underway in the United States; and that

[34] Burt v. Isthmus Dev. Co., 5 Cir. 1955, 218 F.2d 353, *cert. denied*, 1955, 349 U.S. 913, cited by the majority at fn. 37, can be distinguished on several grounds. First, although the factual statement mentions that under the contract the parties submitted to Mexican jurisdiction and waived the jurisdiction of other courts, that element played no part in the decision because the Court found that the basic issue of dispute was whether "negotiations ever matured into a contract". *Id.* at 358. Second, *Burt*, a diversity case, specifically recognized that "[i]n admiralty, courts have often refused to entertain actions . . . between citizens and aliens where foreign law would govern the issue, and have relegated the litigants to the foreign court". *Id.* at 356. Finally, *Burt* followed *Swift's* example and expressly declined to hold that an American citizen's suit could not be dismissed even in nonadmiralty cases. If *Burt* requires "positive evidence of unusually extreme circumstances" and a conviction "that material injustice is manifest", *Id.* at 357, before enforcing a forum clause, it is subject to the same criticisms as *Carbon Black*.

the writ had been improperly served. The High Court of Justice ruled that it had jurisdiction, that the summons had been properly served, and that the action should proceed. Zapata appealed. The English Court of Appeal affirmed, holding that the forum provision was reasonable and that Zapata had made no showing which would compel the Court to refuse to enforce the agreement.[35] Thus, the English courts have ruled that they

---

[35]Lord Justice Willmer said:

* * *

> The law on the subject, I think, is not open to doubt, and I do not think that it is really necessary to cite the authorities to which we have been referred. It is always open to parties to stipulate (as they did in this case) that a particular court shall have jurisdiction over any dispute arising out of their contract. Here the parties chose to stipulate that disputes were to be referred to the "London" court, which I take as meaning the High Court in this country. *Prima facie* it is the policy of the court to hold parties to the bargain into which they have entered. *Prima facie* it is to be presumed, therefore, that the plaintiffs should have leave to prosecute their proceedings in this country, and in pursuance of that to serve their writ out of the jurisdiction. But that is not an inflexible rule, as was shown, for instance, by the case of *THE FEHMARN*, in which I was myself concerned, and which came to this court. That was a case in which the court in its discretion declined to give effect to a stipulation made by the parties in their contract conferring jurisdiction on a foreign court.
>
> I approach the matter, therefore, in this way, that the court has a discretion, but it is a discretion which, in the ordinary way and in the absence of strong reason to the contrary, will be exercised in favour of holding parties to their bargain. The question is whether sufficient circumstances have been shown to exist in this case to make it desirable, on the grounds of balance of convenience, that proceedings should not take place in this country, the stipulated forum, but that the parties should be left to fight their battles in the United States of America.
>
> * * *
>
> I am unable to see that the judge acted on any wrong principle. . . . nor am I prepared to say that the judge's exercise of his discretion is shown to have been plainly wrong.

Lord Justice Diplock added:

* * *

> I say again in this case, as I said in *Mackender:* "Where parties have agreed to submit all their disputes under a contract to the exclusive jurisdiction of a foreign court, I myself should require very strong reason to induce me to permit one of them to go back on his word". We should, I think, apply the same

will hear the controversy. Furthermore, when Unterweser advised the district court that it had initiated the action in England, it offered to keep available all the security given in the initial action — $3,500,000 — to satisfy any relief Zapata might obtain in London.

(4) The majority concludes that factors of convenience do not justify dismissing the action. But the majority treats the question under the doctrine of forum non conviens the standard for which is that the plaintiffs choice of forum "should rarely be disturbed" unless "the balance is strongly in favor" of the defendant. *Gulf Oil Corporation v. Gilbert*, 1947, 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055. I submit that when a forum clause is involved our standard should be not to disturb the *contractual* choice of forum unless "the forum chosen by the parties would be a seriously inconvenient one for the trial of the particular action". Restatement (Second) of Conflict of Laws § 80; Comment, *supra* note 5. From this perspective I conclude that factors of convenience do not justify refusing the motion to decline jurisdiction.

The majority considers the following factors relevant: the casualty occurred close to the Fifth Circuit and the district court; a "considerable number" of witnesses live on the Gulf Coast; preparations for the voyage, inspection of the damage and repair work were performed here; depositions of the Bremen's crewmen are available; and there are no contacts with the English forum. Thus, they agree with the district court, which

---

principle whether the forum of contractual choice is England or of some other country.

Lord Justice Widgery concluded:

> . . . The parties here have quite deliberately chosen that their disputes shall be decided in the courts of this country, and it would need strong grounds in my view to deprive either party who sought to take advantage of that course from receiving the advantage which he expects from it. I also would put my decision on the footing that there is no reason here to suppose that the learned judge exercised his discretion improperly. But, like my Lord, I feel that had I had to decide the matter myself, I should have reached precisely the same conclusion.

concluded that a "great majority, if not all, of the witnesses are or were in the United States, including an alleged forty potential witnesses residing permanently here". But this observation appears to ignore the fact that most of Unterweser's witnesses reside in Germany —the twenty-three crew members of the Bremen, Von Aswegen, Managing Director of Unterweser, personnel from the builders of the Bremen and the independent contractors who outfitted the vessel, individuals with companies for whom Bremen has previously towed. It is true that depositions of the German crew members are available because Zapata obtained them immediately after filing its libel. But if, as is likely, Zapata's witnesses are its crewmen (on the Chaparral) and Unterweser's witnesses are its crewmen (on the Bremen), the inference from that observation is that Zapata should have live witnesses at trial while Unterweser relies on depositions. Presumably depositions of the American witnesses could be taken for an English trial, or both sides could face the same difficulty of transporting their witnesses. Although the voyage began here and the casualty occurred nearby, the tug was built in Germany and had its home port in Bremen. As the High Court of Justice observed, "There is probably a balance of numbers in favor of the Americans, but not, as I am inclined to think, a very heavy balance". The fact that no contacts exist with the English forum is not determinative. That forum was chosen as a logical compromise should a dispute arise.[36] The English court

---

[36] *Cf.* Mittenthal v. Mascagni, 1903, 183 Mass. 19, 66 N.E. 425, 426-27:

> We can fancy the parties to this contract at the time of making it saying something like this: "As the performance of this contract will not only involve travel through one or more foreign countries in getting to America and returning, but will involve journeying long distances through a great many independent states, each of which has its own courts and system of laws, under some of which a person sued in a civil action, when about to leave the state, may be arrested and held to bail or in imprisonment, if suits may be brought in any one of these numerous jurisdictions there is a liability to great trouble and expense on the part of the defendant in meeting the litigation. The contract contemplates a service of fifteen weeks, after which Maestro Mascagni intends to return to his permanent

has the advantage of dividing the inconveniences between the disputants. An English-speaking court with common law traditions is probably more amenable to American plaintiffs than the German courts with which there are "contacts". Finally, the English court may very well have been chosen for the law it would apply. That factor may have enabled Zapata to obtain the low bid from Unterweser. I conclude, therefore, that Zapata has not justified disturbing the contractual choice of forum.

* * * *

For all these reasons, I believe we should overrule *Carbon Black* and remand this case to give the district court an opportunity to find the relevant facts and exercise its discretion in light of the "modern and correct rule".[37] If the district court should properly have declined to exercise its jurisdiction, then of course it should not have enjoined the London action. Given the majority's conclusion that the district court properly retained jurisdiction, however, I do not disagree with its analysis that the injunction was then proper.

---

home, in Florence. It will be better and more reasonable for both of us to provide that our controversies, if any arise, shall be settled by the courts of Florence, than to leave both parties subject to suits in forty or fifty different jurisdictions, at great distances from the home of either." If, moved by such considerations, the parties made the agreement in question, shall the court say that they were non compotes mentis, and that their agreement was so improvident and unreasonable that it cannot be permitted to stand?

Of course if Zapata is correct, that the contract relieves Unterweser from liability for negligence and the English courts will enforce it, then there will be no inconvenience at all, for Zapata will not try to prove negligence.

[37] Unterweser filed a limitation action one week before the time for filing lapsed because the district court had not yet ruled on its motion to dismiss. I do not believe it is thereby estopped from pressing its motion to dismiss.

APPENDIX B

OPINION

ON PETITION FOR REHEARING EN BANC

B-2

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 27497

In the Matter of the Complaint of
UNTERWESER REEDEREI, GMBH

ZAPATA OFF-SHORE COMPANY,

Plaintiff-Appellee,

versus

M/S BREMEN and UNTERWESER REEDEREI, GMBH,

Defendants-Appellants

Appeal from the United States District Court
for the Middle District of Florida

(June 28, 1971)

ON PETITION FOR REHEARING EN BANC

Before BROWN, Chief Judge, WISDOM, GEWIN, BELL,* THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, SIMPSON, MORGAN, CLARK, INGRAHAM and RONEY, Circuit Judges.

---

*Judge Bell did not participate in the consideration or decision of this case.

PER CURIAM: Upon consideration of this cause en banc the Court adopts the majority opinion and judgment of the panel, 428 F.2d 888 (5th Cir. 1970).

WISDOM, Circuit Judge, dissenting, joined by Judges Thornberry, Goldberg, Godbold, Simpson and Clark:

Again I feel impelled to dissent in this case. It is incredible that a court should fail to honor an agreement between a foreign corporation and a domestic corporation to settle their contractual disputes in a neutral forum according to the law of a neutral country long used to its courts' settling admiralty disputes.

The issue as stated in the majority opinion is as follows:

> The question we must decide is whether the district court was *obliged* to decline to exercise admitted jurisdiction under the facts of the admitted case. ____ F.2d ____ (Emphasis added).

In support of its position, the Court quoted the following statement from *Carbon Black Export Inc. v. The S.S. Monrosa*, 5 Cir. 1958, 254 F.2d 297, 300, *cert. dismissed*, 1959, 359 U.S. 180, *rehearing denied* 359 U.S. 999:

> In essence, the motion [to decline jurisdiction] was based upon Clause 27 as buttressed by the doctrine of forum non conveniens. Any consideration of such a question starts with the universally accepted rule that agreements in advance of controversy whose object is to *oust the jurisdiction* of the courts are contrary to public policy and will not be enforced. (Emphasis added).

The issue here is not whether the Court is "obliged" to decline to exercise jurisdiction. It is not whether parties can "oust the jurisdiction of the courts". In this case and similar cases the parties assume that the local court has jurisdiction but agree that in the absence

of unreasonable circumstances the court should exercise its jurisdiction only to the extent of giving effect to the choice of forum clause just as courts give effect to any clause expressing the intention of the contracting parties. The issue is whether in the circumstances of this case it is unreasonable for the court to enforce the bargain struck on an international transaction by two companies of diverse nationalities well able to take care of themselves in negotiating a contract.

The contract was not between some indigent American seaman and Greek shipowner to try disputes in Piraeus, Greece.[1] It was not a towing contract in inland American waterways with the towage company having superior bargaining leverage.[2] The contract in

---

[1]It has been noted that, "If Zapata postulates that forum clauses are against public policy, the Fifth Circuit's opinion in Anastasiadis v. S.S. Ltle John, 5 Cir. 1965, 346 F.2d 281, becomes very difficult to explain. Comment, 8 Houston L. Rev. 739, 743 (1971). In *Anastasiadis* a Greek seaman had contracted in Greece for employment on a vessel of Liberian registry. Although a Liberian corporation owned the vessel, that corporation was in turn wholly owned and controlled by an American corporation, in turn wholly owned and controlled by a United States citizen. The contract, written in Greek, provided that the seaman would join the vessel at Houston, Texas. But it stated that Greek law would govern disputes and designated the Greek courts at Piraeus as the forum. Although a nominal foreign registry is often pierced where American laws are to be enforced against a ship beneficially owned by Americans, this Court declined to do so. We said:

> The contract in the instant case provided not only that Greek law would be determinative but also that the Greek courts were to be the proper forum for the litigation of claims arising out of the contract. We see no reason, in the circumstances of this case, why this provision should not be given effect in the absence of any suggestion in the record that Greece is an inconvenient forum or that Greek law provides an inadequate remedy.

[2]*See* Bisso v. Inland Waterways Corporation, 1955, 349 U.S. 85, 75 S.Ct. 629, 99 L.Ed. 911; Dixilyn Drilling Corporation v. Crescent Towing and Salvage Co., 1963, 372 U.S. 697, 83 S.Ct. 967, 10 L.Ed.2d 78. In *Dixilyn* both parties were American and the tow was to be performed here. *Bisso* emphasized that the exculpatory clause was produced by overweening bargaining power.

this case required the towage company to tow a six million dollar drilling rig from Venice, Louisiana, near the mouth of the Mississippi, through the Gulf of Mexico, across the Mediterranean, and up the Adriatic to Ravenna, Italy. Zapata, owner of the rig, solicited bids from several towing companies. The low bidder, Unterweser, a German company, generally inserts in its contract a provision for trial of disputes in German courts according to German law. The choice of forum provision was an essential element in the final contract, undoubtedly because of the validity of exculpatory clauses in English law and the possibility of the invalidity of exculpatory clauses in towage contracts in American law.[3]

The Court makes a half-hearted attempt to argue that it "was within the sound discretion of the district court to decline jurisdiction on the basis of forum non conveniens". This doctrine puts the burden on the party asserting it to justify its application. The forum non conveniens theory should have no bearing on this case — at least in terms of the burden of proof. Here the parties have agreed on the forum and the applicable law. In these circumstances Zapata, represented by experienced counsel, should not be allowed to welch on its bargain.

The contention that Unterweser should be treated as having assented to the jurisdiction of the local court by filing the limitation action is a red herring. In the first place, Unterweser (more accurately, the tug Bremen left international waters to enter the district court's jurisdiction *upon the instructions of Zapata*. Conveniently, Zapata had a United States marshal waiting to arrest the Bremen when the tug entered Tampa Bay with the disabled Chaparral (the drilling rig). And when Unterweser proceeded to move the district court to dismiss the suit, the district court failed to rule on its motion *until after the statutory period for filing a*

[3] In Seaboard Coast Line Railroad Company v. Tennessee Corporation, 5 Cir., 1970, 421 F.2d 970, this Court enforced an exculpatory clause against a railroad.

limitation action had elapsed. Unterweser had already sued in London for breach of contract. Prior to the limitation action, the High Court of Justice had ruled that Zapata had been properly served and that the action should proceed in the English courts.[4] Thus, the limitation action, filed one week before the expiration of the applicable statute of limitations, was a protective measure. When Zapata moved the district court to restrain further litigation in England, Unterweser moved to stay its own limitation proceeding until the English suit was determined. The majority admits that Unterweser invoked American jurisdiction only reluctantly. The district court may have had the *power* to order Unterweser to cease its English litigation. But *see* 39 U. Cin. L. Rev. 819 (1970).[5] The question remains, how-

---

[4]Zapata appealed the ruling. After Unterweser had filed its limitation action in Tampa, the English Court of Appeal affirmed the High Court of Justice, holding that the forum clause was reasonable, and that Zapata had made no showing to justify the court's refusing to enforce the written agreement.

[5]"Unterweser had moved for the district court to dismiss for lack of jurisdiction, but the court did not rule on the motion. As time passed and the deadline for filing a limitation action in the district court approached, the court still had not ruled on the motions to dismiss. Unterweser was forced to choose one of two alternatives. It could either do nothing and hope that the court would eventually dismiss for lack of jurisdiction, or it could file a limitation action to reduce its liability to the statutory amount—the value of the vessel plus freight revenue due. Unterweser chose the latter alternative and the court held that filing a limitation action mooted the question of jurisdiction. The court of appeals affirmed that holding.

This holding perverts the purpose of a limitation action which is intended to be a defense against multiple claims or a claim in excess of the shipowner's statutory liability and not a device whereby a court can obtain in personam jurisdiction.

. . . Thus, in effect, the court forced Unterweser to file the limitation action and then found the filing of the action cured the question of lack of jurisdiction by holding that the filing mooted the question." Note, 39 U. Cinn. L. Rev. 819 (1970).

In 1949 Judge Learned Hand, in his concurring opinion in Krenger v. Pennsylvania Railroad Co., 2 Cir. 1949, 174 F.2d 556, *cert. denied*, 338 U.S. 886, stated:

[C]ourts have long looked with strong disfavor upon contracts by which a party surrenders resort to any forum which was

ever, even in terms of the majority's analysis, "whether the district court *properly* refused to stay the limitation proceeding." (Emphasis supplied)

I close with a quotation from a law review comment, Application of the Forum Clause to Commercial contracts, 8 Houston L. Rev. 738, 752 (1971), that appeared after the Court had held its en banc conference on this case:

> VII. Summary
>
> Forum clauses were once "taboo" in American courts. Since 1949, however, courts have been more conciliatory toward these contractual provisions. The "ouster" rationale — used in most pre-Krenger[6] decisions as a basis for rejecting forum clauses — has been discarded in large measure. The "reasonableness" test, developed in Muller[7], gives prima facie validity to forum clauses and places the onus on the plaintiff to show that the clause is unreasonable. This test has been accepted by the latest

---

lawfully open to him . . . In truth, I do not believe that, today at least, there is an absolute taboo against such contracts at all: in the words of the Restatement, they are invalid only when unreasonable. . .

[7]Muller & Company v. Swedish American Lines Ltd., 2 Cir. 1955, 224 F.2d 806, *cert. denied*, 1955, 350 U.S. 903, held that courts should enforce a forum clause in an international contract unless it is unreasonable or prohibited by statute. The court pointed out that the burden of proving that the clause is unreasonable, however, is on the plaintiffs, and since the plaintiff received contract consideration for the agreement to litigate all claims in the stipulated forum, "mere inconvenience or additional expense is not the test of unreasonableness. . .The plaintiff cannot prevail in derogation of the forum clause if the stipulated forum is available and can render "substantial justice" to him.

In the instant case, the majority stated that Indussa Corporation v. S.S. Ranborg, 2 Cir. 1967, 377 F.2d 200, overruled this part of *Muller*. But *Indussa's* decision not to enforce a forum clause derived from its view that the Carriage of Goods by Sea Act, 46 U.S.C. §§ 1300-15, where applicable, prohibited such clauses. COGSA did apply to *Muller* (as it did to Carbon Black) and for that reason *Muller* was overruled.

revision of the *Restatement,* the majority of the courts which recently have considered forum clauses, and most of the legal scholars who have written on the problem. Acceptance of the prima facie validity of forum clauses has these advantages: (1) it vitiates the legal fiction of ouster; (2) it reinforces the principle of party autonomy; and (3) it gives discretion to the trial judge who may weigh all the equities. Since the *Muller* test is basically one of discretion, there is always the danger of abuse, especially from jurists who wish to assure to parties who reside within their jurisdiction an open court. On balance, however, the *Muller* test is sound, and it is difficult to imagine any court long rejecting a criterion which is universally referred to as the "reasonableness" test.

The decision of the majority is a backward step by a forward-looking court. It has no place in a shrinking world where international commercial transactions are becoming increasingly commonplace. The safeguard against abuse of the forum clause is the local court's power to determine the reasonableness of enforcing the clause. But the burden of proving unreasonableness should fall on the party seeking to escape from the obligation he contracted to undertake. Zapata has failed to show any good reason for backing out of its bargain.

SIMPSON, Circuit Judge, dissenting:

I respectfully dissent, for the reasons set forth in Judge Wisdom's dissent from the panel decision In the Matter of the Complaint of UNTERWESER REEDEREI, GMBH, ZAPATA OFF-SHORE COMPANY v. M/S BREMEN and UNTERWESER REEDEREI, GMBH, 5 Cir. 1970, ____ F.2d ____ [No. 27,497, June 19, 1970].

APPENDIX C

MEMORANDUM AND ORDER
OF THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

IN THE MATTER OF THE COMPLAINT OF UNTERWESER REEDEREI, GMBH, for Exoneration from, or Limitation of Liability as Owner of the M/S BREMEN

NO. 68-290-Civ-T

MEMORANDUM AND ORDER

Defendant, a German corporation, appearing in its own behalf and as owner of the ocean-going tug M/S BREMEN, has moved the Court to decline jurisdiction and dismiss a maritime claim in a cause of breach of cantract and tort brought by Plaintiff, a Delaware coorporation, the owner of the Drill Barge (Rig) CHAPARRAL, or alternatively to decline jurisdiction or to stay proceedings.

The claim grows out of a casualty which occurred during performance of a towage contract executed in Bremen, Germany. By the contract Defendant agreed to tow Plaintiff's drill barge from Venice, Louisiana, to Ravenna, Italy. In course of the tow voyage, the drill barge suffered a casualty and was towed into Tampa, Florida, by the Defendant's tug. On arrival at Tampa, Florida, Plaintiff caused the tug to be arrested by the United States Marshal pursuant to practice in admiralty proceedings.

Defendant urges that a paragraph of the Towage Contract, which provides:

> "Any dispute arising must be treated before the London Court of Justice"

defeats the jurisdiction of this Court and buttresses its position by seeking application of the doctrine of forum non conveniens. Its first contention is opposed by *Carbon Black Export, Inc. v. The Monrosa,* 254 F.2d 297 (5C. 1958), affirmed, 359 U.S. 999 (1959).

Even *Wm. H. Muller & Co. v. Swedish American Line, Ltd.,* 224 F.2d 806 (2 C. 1955), which under different facts held otherwise, recognizes that a similar clause does not defeat jurisdiction and held that jurisdiction should be declined only after a finding that the agreement is reasonable in a particular case.

Helpful criteria to be considered are given in *Mobile Tankers, S.A. v. Mene Grande Oil Co.,* 363 F.2d 611 (3 C. 1966), cert. denied, 385 U.S. 945 (1966):

> "The factors which must be considered and weighed include the following: libelant's choice of forum; status of the parties; convenience of parties and witnesses; access to sources of proof; cost of obtaining the attendance of willing witnesses; possibility of a view of the premises, if appropriate; relative advantages and obstacles to a fair trial; and, possible difficulty in the application of foreign law. Unless 'the balance is strongly in favor of the [Respondent], [the libellant's] choice of forum should rarely be disturbed.' *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947)."

The citizenship of the parties has been given. Plaintiff chose and obtained the jurisdiction of this Court. The prelude, including a partial performance, alleged casualty and aftermath here all occurred along or near the Gulf Coast of the United States of America and within or adjacent to the jurisdiction of the judicial circuit of which this Court is a part.

A great majority, if not all, of the witnesses are or were in the United States, including an alleged forty potential witnesses residing permanently here. Members of the Bar of this Court have spent considerable time in the investigation and preparation of the trial of this case, 33 oral depositions have been taken, including all of the officers and members of the crew of Defendant's tug and the Defendant's riding crew on Plaintiff's drill barge. Defendant itself has taken oral depositions and with the aid of this Court obtained production of documents, plans and other data.

Plaintiff has made an undisputed showing that English courts apply different tests and rules of liability in cases of this type than do many of the courts of this country.

The contract is printed in English and in any event interpreters would probably have to be used in taking testimony of the German crew, whether this cause is tried here or in England.

Defendant has not suggested and there is no showing that American courts are not capable of adjudicating this case fairly and justly. The balance of conveniences here is not strongly in favor of Defendant and Plaintiff's choice of forum should not be disturbed.

For the reasons given, Defendant's Motions to Dismiss for Lack of Jurisdiction, Requesting the Court to Decline Jurisdiction on Grounds of Forum Non Conveniens, and alternatively to stay further prosecution of these proceedings pending adjudication in England be, and they are each, DENIED.

DONE and ORDERED at Tampa, Florida, this 29th day of July, 1968.

Ben Krentzman
UNITED STATES DISTRICT JUDGE

APPENDIX D

FINAL ORDER
OF THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

IN THE MATTER OF THE COMPLAINT OF UNTERWESER REEDEREI, GMBH, for Exoneration from, or Limitation of Liability as Owner of the M/S BREMEN

NO. 68-290-Civ-T

ORDER

THIS CAUSE came on for consideration upon a Motion for Injunction filed by Zapata Offshore Company, claimant, and a Motion to Stay filed by Unterweser Reederei, plaintiff. The Court having reviewed the excellent briefs submitted and having heard argument of counsel, determines that the injunction prayed for should be granted, and the Motion to stay should be denied. As the basis for this determination the Court makes the following observations and conclusions.

I
STATUS OF PROCEEDING

The present controversy finds its origin in a mishap that occurred in the Gulf of Mexico on January 9, 1968. On January 12, 1968, Zapata Off-Shore Company filed its complaint against Unterweser Reederei, GMBH and the M/S BREMEN in this Court, the case being docketed as 68-21 Civ. T., for damages allegedly sustained by its drill rig CHAPARRAL while in tow of Unterweser's Tug BREMEN. Unterweser responded to the complaint by filing a motion to dismiss for lack of jurisdiction, contending that by virtue of a provision

in the towage contract with Zapata the forum for any litigation should be the "London Court of Justice." The motion sought, alternatively, an order declining jurisdiction or an order staying further prosecution of proceedings in 68-21 Civ. T. The Court denied these motions in its Order of July 29, 1968.

After the Zapata complaint was filed in this Court, Unterweser instituted an action against Zapata in the High Court of Justice in London, England, February 21, 1968. In the London suit Unterweser claimed hire and other moneys due under said contract of towage and for damages for breach of contract. Later, on July 2, 1968, Unterweser filed its complaint in this cause, 68-290 Civ T. seeking exoneration from or limitation of liability arising out of the mishap of January 9, 1968. On July 5, 1968, the Court entered an injunction restraining the prosecution of all other claims and proceedings arising from the events occurring on January 9, 1968.

On July 8, 1968, Zapata filed its claim in this action asserting the same cause of action as alleged in its original complaint in 68-21 Civ. T., and on July 24, 1968, Zapata filed its answer to the complaint.

On August 28, 1968, Unterweser filed its objection to Zapata's claim and also its counterclaim against Zapata, alleging in Count I the same claim as asserted by it in the London suit above mentioned. and in Court II Unterweser alleged a salvage cause of action.

Unterweser continued to pursue its action in the London Court and Zapata sought injunction relief in this Court on September 19, 1968. Unterweser has responded and on October 2, 1968, moved to stay further prosecution of the claim filed by Zapata in this suit. Zapata has not filed answer in the London Court and has not joined issue.

Unterweser states the issue to be decided by the Court thusly:

"Whether a District Court sitting in Admiralty in a limitation proceeding has jurisdiction under any circumstances, to enjoin the petitioner in the limitation proceedings from prosecution of an action in a foreign country against a claimant in the limitation action?"

Limitation proceedings are considered to be equitable in nature. Cases: *A. C. Dodge, Inc. v. Carras*, 218 F.2d 911 (2 Cir. 1955); *The Salvore*, 36 F.2d 712 (2 Cir. 1929); *Hartford Accident & Indemnity Co. v. Southern Pacific Co.* 273 U.S. 207, 1927; *Benedict on Admiralty*, § 479 (6th Ed. 1940).

The Court having once taken jurisdiction in the limitation proceedings may proceed to determine all matters relating to the controversy. As stated in *Hartford Accident Co. v. Southern Pacific Co., supra*, the limitation action is:

". . an equitable suit to the extent that the Admiralty Court, having the broadest of powers to do exact justice between the parties, may take any such action in the case as justice demands . ."

The question of enjoining prosecution of litigation in another forum has been considered in several of the above cases. It seems clear that *one*, when seeking to take advantage of the limitation statutes, § 181 et seq. Title 46, U.S.C. should be required to "do equity" by refraining from litigating the same controversy in other courts. The cases on this issue all regard the determination of whether or not the ship owner may be allowed to proceed simultaneously in the other forum as being based upon equitable considerations. In *the Salvore, supra*, and *A. C. Dodge v. Carras, supra*, the Second Circuit Court of Appeals held that the ship owner could not seek limitation of or exoneration from liability in the District Court while at the same time litigating in other courts. A contrary result was reached in Petition of *A/S J. Ludwig Mowinckel Rederei*, 268 F.Supp.

682, (So. Dist. N.Y. 1967). In that case the collision occurred off the coast of France and action was started in England in the High Court of Justice and the court pointed out that many of the claims were being litigated in the London Court. The Court also pointed out that since other suits by cargo claimants against both ship owners were pending in the French Courts, there could not possibly be one jurisdiction in which a concourse of all claims arising out of the collision could be established. The Court acknowledged that it had the power to grant an injunction in such a case but declined doing so stating that the equitable considerations invoked by the moving party were not impressive. This case certainly does not stand for the proposition that the District Court is without power to grant an injunction in such a case, it merely states that the exercise of the power should be based on equitable facets of the particular case. It is clear from *The Salvore*, *Dodge* and *Mowinckel* cases that the District Court can indeed restrain the petitioner seeking limitation from prosecuting an action based on the same events in another forum.

In seeking the benefits of the Limitation Act, Unterweser should recognize that this Court has jurisdiction, to determine the entire controversy. In aid of this jurisdiction, it may be, and it is, in this case, necessary to require that duplicity of litigation be terminated. This case is unlike cases where there are numerous claimants proceeding in several forums simultaneously. In the case at bar there are only two parties litigating the dispute occasioned by the events of January 9, 1968. Suit was initially filed in this Court, this Court has ruled that it does have jurisdiction over the controversy, and this Court also has taken jurisdiction in the limitation action. The proposition that the case should at the same time be prosecuted in another forum is not well received.

Although Unterweser again argues in its Motion to Stay that the venue provisions of the towage contract are controlling, this Court has already passed on that

contention. While at that time the Court did not rule that Unterweser could not proceed with an action in the London Court, the same considerations recited as a basis for retaining jurisdiction in the Order of July 29, 1968, are determinative of this issue. In addition, Unterweser has voluntarily invoked this Court's jurisdiction in filing this limitation proceeding in which Zapata has filed claim and answer and joined issue, and also Unterweser has invoked this Court's jurisdiction in filing its counterclaim against Zapata upon which issue has also been joined.

This court having first acquired jurisdiction over the parties and the subject matter of this controversy both through the complaint in 68-21 Civ. T. and the limitation action filed by Unterweser in this cause, does have the power to restrain the parties before it from litigating the same matters elsewhere. See: 43 C.J.S. Injunctions, § 49; 28 Am. Jur., Injunctions, § 214; and Modern Federal Practice Digest, Courts, § 492, pocket parts pages 266-267.

The balance of convenience is strongly in favor of litigation in this forum initially and to allow the same action to be prosecuted simultaneously elsewhere would cause inequitable hardship. Such an action could only tend to frustrate and delay the speedy and efficient determination of the cause in this Court. The Court feels that the parties being properly before it should be restrained from proceeding further in the foreign court.

Although Unterweser quite correctly points out that this Court cannot act extraterritorially, the Court does have the power to control the actions of those properly before it. Unterweser, having been brought into the jurisdiction of this Court in 68-21 Civ. T., and having further affirmatively invoked this Court's jurisdiction in the limitation proceeding, is subject to the Court's direction. The Court does not attempt to control the actions of the London High Court of Justice, or any other

foreign tribunal for that matter, but it does hereby restrain Unterweser from proceeding further in litigating this action anywhere else until this Court has made its determination.

Having made these determinations and being otherwise advised in the premises, it is, therefore,

ORDERED and ADJUDGED:

1. That the motion for injunction filed by Zapata Off-Shore Company is GRANTED.

2. That the parties in this cause, Unterweser Reederei, GMBH and Zapata Off-Shore Company, are hereby enjoined from proceeding any further in litigating any and all matters relating to this controversy in other jurisdictions (including that certain action now pending in the High Court of Justice, Probate, Divorce and Admiralty Division (Admiralty), London, England, 1968 Folio 64, styled "Unterweser Reederei, GMBH v. Zapata Off-Shore Company") until such time as this Court has made its determination in the case presently before it. A certified copy of this Order may, however, be filed with or otherwise brought to the attention of the High Court of Justice in London.

3. That the motion for stay filed in this cause by Unterweser Reederei, GMBH be and the same is hereby DENIED.

DONE and ORDERED at Tampa, Florida, this 21st day of January, 1969.

Ben Krentzman
BEN KRENTZMAN
UNITED STATES DISTRICT JUDGE

APPENDIX E

OPINION OF THE SUPREME COURT
OF JUDICATURE
COURT OF APPEAL
CIVIL DIVISION
ROYAL COURTS OF JUSTICE
LONDON, ENGLAND

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL
CIVIL DIVISION

Royal Courts of Justice,
Tuesday, 23rd July, 1968.

Before:

LORD JUSTICE WILLMER,
LORD JUSTICE DIPLOCK and
LORD JUSTICE WIDGERY.

Between:

UNTERWESER REEDEREI GESELLSCHAFT
MIT BESCHRANKFER HAFTUNG

Plaintiffs

and

ZAPATA OFF-SHORE COMPANY

Defendants

"THE CHAPARRAL"

JUDGMENT

REVISED 1968. Folio 64.

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL
CIVIL DIVISION

Royal Courts of Justice,
Tuesday, 23rd July, 1968.

Before:

LORD JUSTICE WILLMER,
LORD JUSTICE DIPLOCK and
LORD JUSTICE WIDGERY.

Between:

UNTERWESER REEDEREI GESELLSCHAFT
MIT BESCHRANKFER HAFTUNG

Plaintiffs

and

ZAPATA OFF-SHORE COMPANY

Defendants

"THE CHAPARRAL"

(Transcript of the Shorthand Notes of THE ASSOCIATION OF OFFICIAL SHORTHANDWRITERS, LIMITED, Room No. 392, Royal Courts of Justice, and No. 2, New Square, Lincoln's Inn, London, W.C.2).

Mr. ANTHONY J. L. LLOYD, Q.C., and Mr. JULIAN H. S. COOKE (instructed by Messrs Richards & Butler) appeared on behalf of the Plaintiffs (Respondents).

Mr. FRANCIS P. NEILL, Q.C., and Mr. KENNETH S. ROKISON (instructed by Messrs Thomas Cooper & Co.) appeared on behalf of the Defendants (Appellants).

JUDGMENT

LORD JUSTICE WILLMER: We need not trouble you further, Mr. Lloyd.

This is an application for leave to appeal from an order made by Mr. Justice Karminski on the 4th June last whereby he dismissed the defendants' application to set aside an order of the learned registrar giving leave to serve a writ out of the jurisdiction. In order to deal with the application it has been necessary to go into all the circumstances of the case and in substance to hear the appeal.

The question at issue between the parties arises out of a marine casualty which took place in January of this year. The plaintiffs are well known towage contractors and owners of a tug called the BREMEN. The defendants are a company incorporated in the United States of America who carry on business *inter alia* in the operation of oil rigs.

In November 1967 the plaintiffs and the defendants entered into a contract in writing for the towage of an oil rig called the CHAPARRAL belonging to the defendants from a place called Venice in Louisiana to Ravenna in Italy by the tug BREMEN. We have been referred to a number of clauses in the contract, only one of which need be mentioned now. The concluding provision of the contract was: "Any dispute arising must be treated before the London Court of Justice".

The towage from Venice began on the 4th January this year. By the 9th January, when the tow was still within the Gulf of Mexico, disaster overtook it, and it

was necessary to take refuge in the port of Tampa in Florida. Each party blamed the other for the disaster which occurred, and each has asserted a claim for damages. The plaintiff tug owners say that the defendants were at fault in that the oil rig being towed was not in a seaworthy condition. The defendants on their part say that the tug was not seaworthy to undertake the voyage, and also that it was negligently operated. There are all the elements present for an interesting battle to ascertain whose fault it was. The defendants got their blow in first, because immediately upon arrival of the tug and tow at Tampa they instituted proceedings in admiralty in the United States District Court at Tampa, and in the course of those proceedings the tug was arrested. The release of the tug was eventually obtained upon security being furnished satisfactory to the defendants in the sum of $3,500,000.

On the 21st February 1968 the plaintiffs issued the writ in the present action and sought leave to serve that writ out of the jurisdiction on the American owners of the oil rig. Leave to serve the writ out of the jurisdiction was obtained from the learned registrar, and it was that matter which came before the learned judge. The grounds upon which the plaintiffs sought leave to serve the writ out of the jurisdiction were, first, that the contract was one which "by its terms, or by implication, was governed by English law", and secondly, that the contract contained an express term to the effect that the High Court should have jurisdiction.

In the meantime, however, the present plaintiffs had taken steps to defend themselves in the proceedings which were being carried on in Tampa. Those proceedings involved taking depositions from a number of witnesses, and in that operation both the present plaintiffs and the present defendants took part. Depositions appear to have been taken from a considerable number of witnesses. But from an early date the plaintiffs took exception to the jurisdiction of the court at Tampa and instituted proceedings to set aside or stay the Ameri-

can action. Those proceedings came before the United States District Court in Tampa on the 28th April of this year, when judgment was reserved. Up to date, so far as we have been informed, no judgment has yet been delivered, and it is not, therefore, known whether the action instituted by the defendants in America will be set aside or stayed. At present, however, assuming that leave to serve this writ out of the jurisdiction stands, there is a situation when proceedings are on foot in both countries. The position is further complicated by the fact that, just before the matter came before Mr. Justice Karminski at the beginning of this month, the plaintiffs launched proceedings for exoneration or limitation of their liability in the United States of America. It is to be pointed out that that is a course which they had to take (if the American proceedings were allowed to continue) within six months of the institution of those proceedings. Time was running out against them, and they were, therefore, forced to institute those proceedings at the beginning of this month in order to preserve their rights.

The learned judge knew of the institution of those proceedings, but he did not actually know (although I have no doubt that he had good reason to suspect) that immediately following the institution of those proceedings an order would be made by the American court which, amongst other things, enjoined the defendants against prosecuting any claim of theirs against the plaintiffs pending the determination of the plaintiffs' limitation proceedings. That, it has been said, would effectively prevent the defendants, if they were so minded, from putting forward a counterclaim in any proceedings in this country. That is a matter much relied upon by the defendants as showing that, as a matter of convenience, and in order to avoid duplication of proceedings, leave ought not to be granted to serve this writ out of the jurisdiction.

Reliance is also placed upon the fact that, under American procedure, it appears that a party sued as a

defendant there (as are the present plaintiffs) who has a counterclaim against the plaintiff in that country is compelled to assert that counterclaim within a certain limit of time, or he will be for all time barred. That is another reason why it is suggested on behalf of the defendants that, as a matter of convenience, proceedings ought not to be allowed to continue in this country, since it is said that it will be necessary for the present plaintiffs to assert their claim by way of counterclaim in the United States.

The law on the subject, I think, is not open to doubt, and I do not think that it is really necessary to cite the authorities to which we have been referred. It is always open to parties to stipulate (as they did in this case) that a particular court shall have jurisdiction over any dispute arising out of their contract. Here the parties chose to stipulate that disputes were to be referred to the "London" court, which I take as meaning the High Court in this country. *Prima facie* it is the policy of the court to hold parties to the bargain into which they have entered. *Prima facie* it is to be presumed, therefore, that the plaintiffs should have leave to prosecute their proceedings in this country, and in pursuance of that to serve their writ out of the jurisdiction. But that is not an inflexible rule, as was shown, for instance, by the case of *THE FEHMARN*, in which I was myself concerned, and which came to this court. That was a case in which the court in its discretion declined to give effect to a stipulation made by the parties in their contract conferring jurisdiction on a foreign court.

I approach the matter, therefore, in this way, that the court has a discretion, but it is a discretion which, in the ordinary way and in the absence of strong reason to the contrary, will be exercised in favour of holding parties to their bargain. The question is whether sufficient circumstances have been shown to exist in this case to make it desirable, on the grounds of balance of convenience, that proceedings should not take place in

this country, the stipulated forum, but that the parties should be left to fight their battles in the United States of America.

The learned judge in his discretion came to the conclusion that it was proper to grant leave to serve the writ out of the jurisdiction so that the action might proceed in this country. We in this court should not interfere with the judge's exercise of his discretion unless it is shown that he acted on some wrong principle, or misapprehended the facts, or unless it is shown that his exercise of his discretion was plainly wrong.

It is said that the situation has to some extent altered, since the time when the learned judge had the matter before him, by reason particularly of the plaintiffs' institution of exoneration and limitation proceedings in the United States to which I have referred. That is the only new factor which has arisen since the time when the learned judge delivered his judgment.

I am unable to see that the judge acted on any wrong principle. I do not think that the new facts said to have been brought to light really alter the complexion of the case to any material extent, nor am I prepared to say that the judge's exercise of his discretion is shown to have been plainly wrong.

I should record the fact that in an affidavit put in on behalf of the plaintiffs today the offer is made (and Mr. Lloyd on behalf of the plaintiffs has renewed it in the course of the argument to waive the provisions of the restraining order which has been obtained by the plaintiffs in the United States so as to relieve the defendants of any difficulty which they might otherwise have in putting forward a counterclaim in this country if they want to. I should also record the fact that an offer has been made on behalf of the plaintiffs (which still holds good) to hold the security which has been furnished in America as available to cover any counterclaim which may be brought in this country. I refer to

those two circumstances because I think that they are in their turn relevant to the question whether it is right to allow these plaintiffs to pursue their action in this country in accordance with their contractual bargain. I think that it is, and that the learned judge reached the right conclusion.

In the circumstances I think that the appropriate order for us to make is that the defendants be granted leave to appeal, but that the appeal will be dismissed.

LORD JUSTICE DIPLOCK: I agree, and add very little.

It has long been recornised that the jurisdiction of the High Court to give leave for service of a writ, or notice of a writ, out of the jurisdiction under Order 11, rule 1, is one which should be exercised with caution, because there are circumstances set out in that rule in which service outside the jurisdiction is authorized which are in conflict with the ordinary rules of comite, that is to say, the courts in this country assert a jurisdiction in themselves wider than that which they recognise in the courts of other countries. That need for caution has been frequently expressed. It was expressed by Lord Justice Farwell fifty years ago in *THE HAGEN*, reported in 1908 Probate Division, 189, at page 201, and has been re-asserted fairly recently by this court in 1967 in *Mackender v. Feldia A. G.* reported in 1967 2 Queen's Bench Division, 590.

Those observations should be read in relation to an application for service out of the jurisdiction under rule 1. Rule 2, which is a separate rule and applies to this case, authorises service out of the jurisdiction where the contract contains a term to the effect that the High Court has jurisdiction to hear and determine any action in respect to the contract. This does not raise any question of conflict with ordinary comity because, so far as I know, it is the policy of the courts of most countries, if it be reasonable at any rate to do so, to see that parties keep their word; and having had the priv-

ilege of reading a memorandum brief which has been accepted in the Federal District Court at Tampa on behalf of the plaintiffs in this action, it looks to me as of there is some ground at any rate for saying that the Federal courts and State courts in the United States take the same view.

When it comes to a case under Order 11, rule 2, as distinct from a case under Order 11, rule 1, I say again in this case, as I said in *Mackender*: "Where parties have agreed to submit all their disputes under a contract to the exclusive jurisdiction of a foreign court, I myself should require very strong reason to induce me to permit one of them to go back on his word". We should, I think, apply the same principle whether the forum of contractual choice is England or of some other country. The question arises more frequently before us where the forum of contractual choice is some other country, as in *Mackender's* case, where the choice was Belgium. In the present case the choice of the parties was the English court and, as I say, I should myself require strong grounds for saying that one of the parties should not keep his word.

There is, of course, undoubtedly a discretion on the part of the court in this case to refuse to allow service of the writ outside the jurisdiction despite the contractual term in the contract. The learned judge from whom this appeal is brought recognised that he had a discretion. So far as I can see he applied his mind to all the relevant matters and, even if I myself might have come to some other conclusion, I do not think that any ground has been put forward which would justify the court in interfering with his discretion. Having said that, let me say (as must have been apparent during the course of this hearing) that I agree entirely with his decision. I should have done the same myself.

LORD JUSTICE WIDGERY: I agree with both judgments. The parties here have quite deliberately chosen that their disputes shall be decided in the courts of this

country, and it would need strong grounds in my view to deprive either party who sought to take advantage of that course from receiving the advantage which he expects from it. I also would put my decision on the footing that there is no reason here to suppose that the learned judge exercised his discretion improperly. But, like my Lord, I feel that had I had to decide the matter myself, I should have reached precisely the same conclusion.

I also would dismiss this appeal.

Mr. LLOYD: I have to ask for the costs of the appeal, my Lord.

LORD JUSTICE WILLMER: Yes, I think that follows.

Mr. NEILL: As a matter of technicality, I think that two of your Lordships said "Appeal dismissed". Does it follow, my Lord, that you granted leave to appeal?

LORD JUSTICE WILLMER: Thank you for reminding me; I am afraid that it had slipped my mind that the whole matter was before us.

Mr. NEILL: Sometimes the two arguments run into one another, and that did happen here.

Mr. LLOYD: I would rather like your Lordships to say that this is a case in which leave should not be given, though I do not think that it very much matters. There is the danger that leave will be treated as being automatic. I would submit that leave was required, and the learned judge who heard the case did refuse leave. I ask your Lordships, having heard my friend's argument, to say that leave ought not to be given.

LORD JUSTICE DIPLOCK: You have had a long obiter judgment, Mr. Lloyd.

(Their Lordships conferred).

LORD JUSTICE WILLMER: I think that is right. I think that we must grant leave, but on the hearing of the appeal we dismiss the appeal.

LORD JUSTICE DIPLOCK: Costs will probably tax higher on that footing.

Mr. LLOYD: I suppose there will be some separate costs of the application for leave to appeal.

LORD JUSTICE WILLMER: Well, there was a notice of motion; I do not know how much costs that carries.

APPENDIX F

ORDER GRANTING REHEARING EN BANC

F-2

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 27497

In the Matter of the Complaint of
UNTERWESER REEDEREI, GmbH,

ZAPATA OFF-SHORE COMPANY,
Plaintiff-Appellee

versus

M/S BREMEN and UNTERWESER REEDEREI GmbH,
Defendants-Appellants.

Appeal from the United States District Court for the Middle District of Florida

---

Before BROWN, Chief Judge, WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, SIMPSON, MORGAN, CLARK and INGRAHAM, Circuit Judges.

BY THE COURT:

A member of the Court in active service having requested a poll on the application for rehearing en banc and a majority of the judges in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that the cause shall be reheard by the Court en banc on briefs without oral argument. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

APPENDIX G

JUDGMENT ON REHEARING EN BANC AND MANDATE

G-2

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

October Term, 1969

No. 27497

D. C. Docket No. Civ. 68-290-T & 68-21-T
In the Matter of the Complaint of

UNTERWESER REEDEREI, GMBH
ZAPATA OFF-SHORE COMPANY,
Plaintiff-Appellee,

versus

M/S BREMEN and
UNTERWESER REEDEREI GMBH,
Defendants-Appellants.

Appeal from the United States District Court for the Middle District of Florida

---

Before BROWN, Chief Judge, WISDOM, GEWIN, BELL,* THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, SIMPSON, MORGAN, CLARK, INGRAHAM and RONEY, Circuit Judges.

JUDGMENT ON REHEARING EN BANC

This cause came on to be heard on rehearing en banc without oral argument.

ON CONSIDERATION of this cause en banc the Court adopts the majority opinion and judgment of the panel dated June 19, 1970, and the order of the District Court appealed from in this cause, be, and the same is hereby, affirmed;

It is further ordered that defendants-appellants pay to plaintiff-appellee, the costs on appeal to be taxed by the Clerk of this Court.

June 28, 1970

WISDOM, Circuit Judge, dissenting, joined by Judges Thornberry, Goldberg, Godbold, Simpson and Clark:
SIMPSON, Circuit Judge, disssenting:
Issued As Mandate: Jul 20 1971

---

*Judge Bell did not participate in the consideration or decision of this case.

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
SEP 25 1972
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM — 1972

No. 71-322

IN THE MATTER OF THE COMPLAINT OF
UNTERWESER REEDEREI, GMBH,
FOR EXONERATION FROM OR LIMITATION
OF LIABILITY AS OWNER OF THE M/S BREMEN
UNTERWESER REEDEREI, GMBH,

Petitioner;

v.

ZAPATA OFF-SHORE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

JAMES K. NANCE OF
BAKER & BOTTS
3000 One Shell Plaza
Houston, Texas 77002
and
DEWEY R. VILLAREAL, JR., of
FOWLER, WHITE, GILLEN,
HUMKEY, KINNEY &
BOGGS, P.A.
P. O. Box 1438
Tampa, Florida 33601
Attorneys for Respondent,
ZAPATA OFF-SHORE COMPANY

FIDELITY PRINTING COMPANY, INC., HOUSTON

TABLE OF CONTENTS
AND OTHER AUTHORITIES CITED

	PAGE
OPINION BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
STATEMENT	2
SUMMARY OF ARGUMENT	5
ARGUMENT	6
INTRODUCTION	6
THE DECISION BELOW IS CORRECT	7
The District Court Properly Denied Unterweser's Motion to Stay Because the Forum Clause is Non-exclusive and in Any Event Could Not Bar Zapata from Prosecuting a Claim in the Limitation Suit Unterweser Commenced	7
The District Court Properly Denied Unterweser's Motion to Stay Because Unterweser Had Submitted Itself and the Entire Controversy to the District Court's Jurisdiction by Filing the Limitation Suit, Procuring the Issuance of a Limitation Injunction, and Counterclaiming against Zapata	8
The District Court Properly Denied Unterweser's Motion to Stay Because the Record Shows It Would be Unreasonable to Enforce the Forum Clause. The Practical Result of Enforcement Would be to Deprive Zapata of a Remedy It Possesses in the American Court Under American Law	11
The District Court Properly Denied Unterweser's Motion to Stay Because the Balance of Convenience is Strongly in Favor of Trying This Controversy in the American Court. To Enforce the Forum Clause Would be Unreasonable	14
THERE IS NO CONFLICT OF DECISIONS	16
NO QUESTIONS OF IMPORTANCE ARE INVOLVED	20
CONCLUSION	24
CERTIFICATE OF SERVICE	25

TABLE OF CASES

	PAGE
Anastasiadis v. S. S. Little John, 346 F.2d 281 (5th Cir. 1965), cert. den. 384 U.S. 920	21
Bisso v. Inland Waterways Corp., 349 U.S. 85 (1955)	12
British Transportation Commission v. United States, 230 F.2d 139 (4th Cir. 1956), aff'm'd 354 U.S. 129 (1957)	10
Carbon Black Export, Inc. v. The SS Monrosa, 254 F.2d 297 (5th Cir. 1958)	21
Central Contracting Co. v. Maryland Casualty Co., 367 F.2d 341 (3rd Cir. 1966)	6, 12, 18, 20, 21
Chemical Carriers, Inc. v. L. Smit & Co.'s Internationale Sleepdienst, 154 F.Supp. 886 (S.D. N.Y. 1957)	11
Deep Sea Tankers v. The Long Branch, 258 F.2d 757 (2d Cir. 1958), cert. den. 358 U.S. 933 (1958)	9
Dixilyn Drilling Corp v. Crescent Towing & Salvage Co., 372 U.S. 697 (1963)	12
A. C. Dodge, Inc. v. J. M. Carras, Inc., 218 F.2d 911 (2d Cir. 1955)	10
General Motors Overseas Operations, et al. v. S.S. Goettingen, et al., 225 F.Supp. 902 (S.D. N. Y. 1964)	12
Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947)	15
Hartford Accident & Indemnity Co. v. Southern Pac. Co., 273 U.S. 207 (1927)	10
Hawaii Credit Card Corp. v. Continental Credit Card Corp., 290 F.Supp. 848 (D.C. Hawaii 1968)	14
Indussa Corp. v. S.S. Ranborg, 377 F.2d 200 (2nd Cir. 1967)	21
National Equipment Rentals Ltd. v. Szukhent, 375 U.S. 311 (1964)	6, 16, 17, 20
Oceanic Steam Nav. Co. v. Corcoran, 9 F.2d 724 (2nd Cir. 1925)	13, 23
Stevens v. The White City, 285 U.S. 195 (1932)	13
The Belgenland, 114 U.S. 355 (1885)	13
The Chickie, 141 F.2d 80 (3rd Cir. 1944)	9
The Gylfe v. The Trujillo, 209 F.2d 386 (2nd Cir. 1954)	13
The Kensington, 183 U.S. 263 (1902)	13, 22
The Monrosa v. Carbon Black Export, Inc., 359 U.S. 180 (1959)	7

PAGE

The Salvore, 36 F.2d 712 (2d Cir. 1929) 10
The Scotland, 105 U.S. 24 (1881) 12
The Titanic, 233 U.S. 718 (1914) 13
The Western Farmer, 210 F.2d 754 (2nd Cir. 1954) 13
Wm. H. Mullet & Co., Inc. v. Swedish American Line Ltd., 224 F.2d 806 (2d Cir. 1955) 6, 11, 12, 17, 18, 20, 21

OTHER AUTHORITIES

6A Corbin on Contracts, § 1445 (1967) 8
Anno., 56 A.L.R 2d 300 (1957) 8

IN THE

Supreme Court of the United States

OCTOBER TERM — 1972

No. 71-322

IN THE MATTER OF THE COMPLAINT OF
UNTERWESER REEDEREI, GMBH,
FOR EXONERATION FROM OR LIMITATION
OF LIABILITY AS OWNER OF THE M/S BREMEN
UNTERWESER REEDEREI, GMBH,

Petitioner,

v.

ZAPATA OFF-SHORE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The panel opinion of the court of appeals (Pet. App. A)[1] is reported at 428 F.2d 888 (CA 5, 1970). On rehearing en banc, the court adopted, per curiam, the majority holding and judgment of the panel (Pet. App. B), Slip Opinion of June 28, 1971. The Order of the district court (Pet. App. D) is reported at 296 F.Supp. 733 (M.D. Fla. 1969).

The heading of Appendix C to the Petition for a Writ of Certiorari indicates incorrectly that the district court's Memorandum and Order of July 29, 1968 was entered in

[1] "Pet. App." refers to the Appendices to the Petition for a Writ of Certiorari filed in this case.

Unterweser's limitation suit, No. 68-290. Actually this Memorandum and Order, from which no appeal was taken, was entered in Zapata's first filed suit, No. 68-21.

JURISDICTION

The jurisdictional requirements are adequately set forth in the Petition.

QUESTION PRESENTED

Zapata commenced suit against Unterweser in Tampa. Unterweser then commenced suit against Zapata in London. Next Unterweser filed a suit for exoneration from or limitation of liability in Tampa and obtained in that suit an injunction staying Zapata's first filed suit. Zapata filed claim and answer in the limitation suit. Unterweser counterclaimed. Zapata replied to the counterclaim. At this point Zapata moved the limitation court to enjoin Unterweser's prosecution of the London suit and Unterweser moved the limitation court to stay the limitation suit. The question is:

> WHETHER, IN THE CIRCUMSTANCES OF THIS PARTICULAR CASE, THE DISTRICT COURT ABUSED ITS JUDICIAL DISCRETION IN RULING THAT ALL OF THE CONTROVERSIES AT ISSUE BETWEEN UNTERWESER AND ZAPATA SHOULD BE TRIED IN UNTERWESER'S OWN TAMPA SUIT FOR EXONERATION FROM OR LIMITATION OF LIABILITY.[2]

STATEMENT

Zapata, a Houston based American corporation, engaged Unterweser, a Bremen based German corporation, to tow the American flag drill rig CHAPARRAL from the Missis-

[2] Unterweser does not seek certiorari to review the affirmance of the injunction against prosecution of the London suit. And Judge Wisdom, in his dissenting opinion to the panel decision, agrees that injunction was proper if jurisdiction were properly retained in Tampa. (Pet., App. A, A-43)

sippi River below New Orleans to the Mediterranean. On the tow from the mouth of the Mississippi to the Straits of Florida the CHAPARRAL on January 9, 1968 was heavily damaged by the loss of its three legs. Zapata told Unterweser to tow the wreck to Tampa, Florida, the nearest port of refuge.

On January 12, 1968, Zapata commenced suit against Unterweser *in personam* and the tug BREMEN *in rem* alleging negligent towage on the part of those in charge of the BREMEN.

When the flotilla arrived at Tampa, the U.S. Marshal arrested Unterweser's tug, the BREMEN, in Zapata's suit. Zapata deposed Unterweser's managing director, and the entire 23 man crew of the BREMEN in Tampa January 23-31, 1968.

On January 29, 1968 Unterweser, asserting the forum clause, moved for dismissal of Zapata's suit contending the district court lacked jurisdiction. Alternatively, Unterweser moved the court (1) to decline jurisdiction on forum non conveniens grounds, or (2) to stay the Tampa suit pending submission of the matter to the English courts. (The court denied these motions on July 29, 1968 and no appeal was taken.)

Meanwhile Unterweser commenced suit *for breach of contract* against Zapata in London on February 21, 1968.

Unterweser, *after notice filed in Zapata's suit,* deposed the CHAPARRAL's 8 man crew in Tampa February 22-25, 1968.

Further invoking the Tampa court's judicial processes, Unterweser moved for the production of 33 categories of documents on February 27, 1968. Zapata responded by producing 700 pages of documents for Unterweser's inspection.

On March 15, 1968, Unterweser noticed the depositions of 2 expert surveyors who had approved the seaworthiness of the CHAPARRAL for the tow. These depositions were taken in New Orleans April 9-12, 1968.

On July 2, 1968 *Unterweser filed a Complaint* in the U.S. District Court at Tampa seeking exoneration from or limitation of liability for events on the voyage upon which the CHAPARRAL was damaged.

On July 5, 1968 the district court, on Unterweser's motion, stayed the further prosecution of Zapata's first filed suit.

On July 8, 1968 Zapata filed its claim and answer in Unterweser's limitation suit, and on July 24, 1968 Zapata filed its Answer.

On August 28, 1968 Unterweser filed a Counterclaim against Zapata for everything sought in the London *breach of contract* suit, but *in addition* Unterweser alleged (1) in Count I a *maritime tort* (negligence) against Zapata for damages to the BREMEN's towing gear, and (2) in Count II a claim for a salvage award for services rendered by the BREMEN following the casualty.

On September 13, 1968 Zapata replied to Unterweser's Counterclaim. All issues between the parties were then joined.

On September 19, 1968 Zapata moved for an order enjoining Unterweser from prosecuting its London suit.

On October 2, 1968 Unterweser moved for an order staying the further prosecution of Zapata's claim in the limitation suit pending final determination of the London suit.

On January 21, 1969 the district court denied Unterweser's motion to stay and granted Zapata's motion for

injunction against Unterweser's prosecution of the London suit. This is the order from which Unterweser appealed.

In the London suit (1) Zapata has not joined issue, (2) Zapata has asserted no counterclaim, and (3) neither party has taken any testimony.

SUMMARY OF ARGUMENT

Certiorari should not be granted to review affirmance of a discretionary order in a limitation suit.

Having submitted itself and the dispute to the Tampa district court by filing suit for limitation of liability and counterclaiming against Zapata, and having had Zapata's first filed suit stayed by the limitation injunction, Unterweser should not be heard to complain that the district court refused to stay the limitation suit. Unterweser might have plead the limitation statutes as a defense had it not wanted the concourse, with its *ex parte* stay of all other proceedings.

Unterweser's London forum clause does not even purport to reach Zapata's *claim* in this Unterweser-commenced Tampa suit for limitation of liability.

It would have been unreasonable for the district court to enforce this forum clause on the facts in this case, so the case does not turn on the validity or invalidity, *per se*, of the forum clause.

Enforcement of the forum clause would have been unreasonable, because it would effectively deprive Zapata of a remedy it has in the American court for its negligence action against Unterweser — a remedy not allowed in the London court.

Enforcement of the forum clause would have been unreasonable because the balance of convenience is strongly in

favor of the Tampa court. The voyage preparations, the voyage, and the aftermath all occurred in the United States or nearby in the Gulf of Mexico. Forty witnesses live on the Gulf Coast or the lower Mississippi. The foreign crew members have been deposed. In all, 35 oral depositions have been taken. The Tampa suit is substantially ready for trial. Issue has not even been joined in London.

The asserted conflicts simply do not exist. *National Equipment Rentals Ltd.* v. *Szukhent* 375 U.S. 311 (1964) was a service of process case and *Wm. H. Muller & Co., Inc.* v. *Swedish American Line Ltd.*, 224 F.2d 806 (2d Cir. 1955) and *Central Contracting Co.* v. *Maryland Casualty Co.*, 367 F.2d 341 (3rd Cir. 1966) arise on facts so different that the cases should not even be compared.

The law is clear enough on the comity and public policy questions Unterweser poses. Unterweser simply does not agree with the conclusion the lower courts reached in applying that law to the facts of this case.

ARGUMENT

Introduction

Unterweser is seeking certiorari to review affirmance of a discretionary order entered by a district court in a limitation case Unterweser started. Unterweser, in what must be one of the most remarkable requests ever made to a limitation court, would have the district court decline to exercise the very jurisdiction Unterweser itself invoked, on the strength of a non-exclusive forum clause that does not even purport to prohibit Zapata from prosecuting a claim in this Unterweser-commenced limitation proceeding.

THE DECISION BELOW IS CORRECT

The District Court Properly Denied Unterweser's Motion to Stay Because the Forum Clause is Non-exclusive and in any Event Could not Bar Zapata From Prosecuting a Claim in the Limitation Suit Unterweser Commenced.

The forum clause reads:

> "Any dispute arising must be treated before the London Court of Justice."

The original proposed contract of towage, including the forum clause in question, was drafted by Unterweser, and the clause was not changed in the final draft (Taylor Affidavit, App. 63-64).[3] Unterweser's towage contracts ordinarily provide for "exclusive" German jurisdiction (von Aswegen Affidavit, App. 22). Unterweser easily might have included "exclusive" language in the forum provision but it did not. In these circumstances, in accordance with the familiar rule, courts will not stretch the language to cover the draftsman's omissions. The *Monrosa* v. *Carbon Black Export, Inc.*, 359 U.S. 180, 183 (1959).

This non-exclusive forum clause certainly did not preclude Zapata from prosecuting an *in rem* proceeding in the district court to enforce its maritime lien against the BREMEN for a maritime tort.[4]

But more importantly, the forum clause does not even purport to prohibit Zapata from prosecuting its claim for the CHAPARRAL's damages in Unterweser's *own* limitation action.

---

[3] "App." refers to printed appendix filed in the Fifth Circuit, which has been certified to this Court.

[4] Unterweser's forum clause does not in terms apply to *in rem* proceedings. This Court has held that a forum clause which does not in terms include *in rem* proceedings does not bar the filing of an *in rem* proceeding in another forum. *The Monrosa*, supra, 182-183.

It is settled law that parties, by the use of forum clauses, exclusive or non-exclusive, cannot oust an American court of its jurisdiction over parties properly brought before it.[5] The non-exclusive clause in this case should not be *stretched* to produce the inequitable result of prohibiting Zapata from prosecuting its claim in the American court whose jurisdiction Unterweser has invoked to obtain affirmative relief.

In brief, this particular forum clause is not applicable to Zapata's claim in Unterweser's limitation suit. Thus a decision on Unterweser's first question — whether forum clauses are *per se* invalid because contrary to U.S. public policy — is not necessary to the decision of this case.

The District Court Properly Denied Unterweser's Motion to Stay Because Unterweser had Submitted Itself and the Entire Controversy to the District Court's Jurisdiction by Filing the Limitation Suit, Procuring the Issuance of a Limitation Injunction, and Counterclaiming against Zapata

Unterweser is seeking certiorari to review affirmance of a discretionary order entered by the district court in a limitation suit Unterweser started.

After fully litigating with Zapata in the latter's first filed suit, after noticing and taking 10 depositions, after a total of 35 depositions (2170 pages) were taken by both parties, and after 700 pages of documents were produced by Zapata on *Unterweser's motion for discovery,* Unterweser filed this suit in the same court affirmatively seeking exoneration

---

[5] 6A Corbin on Contracts, § 1445 (1962); Anno., 56 A.L.R. 2d 300 (1957).

from or limitation of liability.[6] Unterweser alleged that it "... desires to contest its liability and the liability of M/S BREMEN for the injuries, losses and damages ... incurred upon said voyage, *and particularly any losses and damages incurred by the owners [Zapata] of the drill rig CHAPARRAL ...*" (App. 88) (emphasis added)

Unterweser further asserted in its ad interim stipulation that "... the Plaintiff [Unterweser] wishes to prevent the prosecution of all proceedings against Plaintiff, or M/S BREMEN ... in any and all courts ... arising out of the matters ... recited in said Complaint ... *except in the present proceedings ...*" (App. 95) (emphasis added)

Unterweser obtained the usual limitation injunction, stopping the full blown litigation in Zapata's first filed suit. Besides asking the court for exoneration from or limitation of liability, Unterweser *counterclaimed against Zapata,* for the *same breach of contract damages* sought in its London suit, but *in addition* alleged (1) a maritime *tort* (negligence) for damages to the BREMEN's towing gear, and (2) a claim for a *salvage* award for services rendered by the BREMEN to the wrecked CHAPARRAL.

---

[6] Unterweser could have obtained the *protection* of the limitation statutes by raising limitation as a defense to Zapata's suit. *Deep Sea Tankers* v. *The Long Branch,* 258 F.2d 757 (2d Cir. 1958), cert. den. 358 U.S. 933 (1958); *The Chickie,* 141 F.2d 80 (3rd Cir. 1944). But by commencing the limitation suit Unterweser could, by use of the limitation injunction, block prosecution of all suits against it except in the limitation forum. Striving to avoid the effect of its own waiver of the forum clause, Unterweser says it was forced to file for limitation because the district court had not ruled on the motions which Unterweser had filed. This argument does not stand up to analysis. No ruling the district court made would have tolled the running of the statutory six months period. There is no way the effect of the forum clause could have been finally decided in the appellate court within six months.

Obviously Unterweser wanted a concourse to try all claims against it, because, as alleged in its Complaint, it "fears the filing of additional claims." (App. 85). There were potential CHAPARRAL crewmember claims for personal injuries in addition to Zapata's property damage claim.

With its limitation complaint and counterclaim both at issue, and Zapata's first filed suit stayed, Unterweser asked the district court to stay *this* suit until it could litigate the subject in London, relying on a non-exclusive forum clause in the towage contract.

The effect of the forum clause must be considered in the context of the limitation court's equity powers. For illustrations of the limitation court's authority to compel a reluctant limitation plaintiff to do equity, see *The Salvore*, 36 F.2d 712 (2d Cir. 1929)[7] and *A. C. Dodge, Inc.*, v. *J. M. Carras, Inc.*, 218 F.2d 911 (2d Cir. 1955).[8]

The district court, relying upon *The Salvore*, *Dodge* v. *Carras* and this Court's landmark decision in *Hartford Accident & Indemnity Co.* v. *Southern Pac. Co.*, 273 U.S. 207 (1927),[9] held:

> "... It seems clear that one, when seeking to take advantage of the limitation statutes ... should be required to do 'equity' by refraining from litigating the same controversy in other courts ... Unterweser should recognize that this Court has jurisdiction to determine the entire controversy. *In aid of this jurisdiction, it may be, and it is, in this case, necessary to require that duplicity of litigation be terminated.*" (Pet., App. D, D-5) (emphasis added)

---

[7] 2d Circuit ordered district court to dissolve limitation injunction unless limitation-seeking shipowner agreed to *stay* trial of Italian suit which might involve same issues.

[8] 2d Circuit affirmed district court's use of equitable powers in limitation case to compel limitation plaintiff to obtain *stay* of its suit in another forum to avoid dissolution of limitation injunction.

[9] This Court held a limitation proceeding facilitates a settlement of the whole controversy and that it is "an equitable suit to the extent that the admiralty court, *having the broadest of powers to do exact justice between the parties*, may take such action in the case as justice demands ..."

This Court reaffirmed its *Hartford* holding in deciding *British Transportation Commission* v. *United States*, 230 F.2d 139 (4th Cir. 1956), affirmed 354 U.S. 129 (1957).

Having *started* the limitation suit in Tampa, having had Zapata *enjoined* from prosecuting its claim outside the limitation suit, and having *counterclaimed* against Zapata in the limitation suit, Unterweser cannot justifiably argue, nor has it shown, that the district court abused its discretion in keeping the entire controversy in Tampa *where Unterweser itself had put it.*

It is not necessary for this Court to determine the *per se* validity of the forum clause under these circumstances.

The District Court Properly Denied Unterweser's Motion to Stay Because the Record Shows it Would be Unreasonable to Enforce the Forum Clause. The Practical Result of Enforcement Would Be to Deprive Zapata of a Remedy It Possesses in the American Court Under American Law.

Unterweser argues the forum clause should be enforced unless enforcement is unreasonable. Where the practical effect of enforcement might deprive the party resisting the forum clause of all remedy,[10] or would substantially affect

---

[10] *Chemical Carriers, Inc.* v. *L. Smit & Co.'s Internationale Sleepdienst,* 154 F.Supp. 886 (S.D.N.Y. 1957). Dutch tug (Smit), on voyage tow (Chemical Carriers vessel), salvaged German ship. Under American law Chemical Carriers was entitled to participate in salvage award, but not so under Netherlands law. Court refused to enforce exclusive forum clause (Rotterdam) because to do so would be unreasonable, holding (888): "... in view of ... Netherlands law, the practical result of compelling libelant to litigate in Rotterdam courts might well be to deprive it of all remedy". The court, recognizing the reasonableness test of *Muller* was applicable, distinguished same, pointing out "... there was no showing [in *Muller*] ... that the libelant would be without effective remedy in the foreign forum."

its substantive rights,[11] or would put one of the parties to an unreasonable disadvantage,[12] or would subject an American citizen sent abroad to a different measure of damages or a more restrictive limitation proceeding,[13] the courts agree enforcement would be unreasonable.

The practical effect of enforcing this forum clause would be to affect substantially Zapata's substantive rights. The clauses in the towage contract exonerating Unterweser from liability for its negligence and casting all loss resulting from damage to the CHAPARRAL on Zapata[14] are valid and enforceable under the laws of England,[15] but invalid and unenforceable under the maritime law of the United States.[16] In the Tampa forum the rights and liabilities of Zapata and Unterweser are to be measured by the United States maritime law, even though the casualty occurred in international waters.[17] In any event, and con-

---

[11] *General Motors Overseas Operations* v. *S. S. Goettingen*, et al., 225 F.Supp. 902 (S.D.N.Y. 1964). The court, applying *Muller* test of reasonableness, declined to enforce forum clause on ground that to remit plaintiffs to German courts would *substantially affect their rights*. The interpretation of "peril of the sea" under German law was such that a storm, not severe enough to free a carrier from liability under American law, might be sufficient under German law to free the carrier from liability. The court distinguished *Muller* saying (906): "...the Court [Muller] clearly pointed out that the foreign law would be 'no more restrictive' than United States law on the shipper's rights."

[12] *Central Contracting Co.* v. *Maryland Casualty Co.*, 367 F.2d 341 (3d Cir. 1966), 345.

[13] *Wm. H. Muller & Co., Inc.* v. *Swedish American Line Ltd.*, 224 F.2d 806 (2d Cir. 1955), 808.

[14] "1. ... URAG, their masters and crews are not responsible for defaults and/or errors in the navigation of the tow.

"2(b) Damages suffered by the towed object are in any case for the account of its Owners." (App. 26)

[15] Uncontradicted opinion of English maritime law expert Bateson. (App. 65-71)

[16] *Dixilyn Drilling Corp.* v. *Crescent Towing & Salvage Co.*, 372 U.S. 697 (1963) [following *Bisso* v. *Inland Waterways Corp.*, 349 U.S. 85 (1955)], and invalidating *freely negotiated* exculpatory clause in consideration of which tow hire was reduced.

[17] Forum law determines high seas *tort* liability where one vessel owner is American and the other is foreign. *The Scotland*, 105

tract language notwithstanding, American courts will *not* enforce provisions exonerating shipowner from its negligence though valid under foreign law *but void under American law,* because to do so would violate the public policy of the United States.[18]

If Unterweser demonstrates a right to limit liability in England, the limitation fund will be 33,600 pounds sterling ($80,136).[19] In the United States the limitation fund is at least $1,300,000 (Unterweser's ad interim stipulation). This is important because Zapata's *uninsured* losses exceed $3,000,000.[20]

Although Unterweser alleges in its complaint that its right to a limitation of liabiliy is governed by the English law, the amount of Unterweser's liability in this American proceeding (i.e., the limitation fund) is governed by the law of the forum and the United States limitation of liability statutes.[21]

The English limitation fund ($80,136) would be about 6% of the American fund ($1,300,000). To relegate Zapata to the English court would substantially affect its remedy.

U.S. 24 (1881); *The Belgenland,* 114 U.S. 355 (1885), 369; *The Gylfe and The Trujillo,* 209 F.2d 386 (2d Cir. 1954), 387.

Suit by tow owner against tug owner for damages caused by negligent towing is *ex delicto* not *ex contractu. Stevens* v. *The White City,* 285 U.S. 195 (1932).

[18] *The Kensington,* 183 U.S. 263 (1902), 269-270; *Oceanic Steam Nav. Co.* v. *Corcoran,* 9 F.2d 724 (2d Cir. 1925).

[19] Complaint for limitation (33,600 pounds sterling). (App. 91); Opinion of English maritime law expert. (Appendix B-4 of Zapata's Supplemental Brief in Fifth Circuit — certified to this Court).

[20] Affidavit of Zapata's executive vice president. (Supplemental Appendix A-2 of Zapata's Supplemental Brief on Rehearing in Fifth Circuit — certified to this Court).

[21] *The Titanic,* 233 U.S. 718 (1914); *The Western Farmer,* 210 F.2d 754 (2d Cir. 1954).

The District Court Properly Denied Unterweser's Motion to Stay Because the Balance of Convenience is Strongly in Favor of Trying This Controversy in the American Court. To Enforce the Forum Clause Would be Unreasonable.

The courts, in testing the reasonableness of a forum clause for determination of its enforceability, consider the conveniences of the parties.[22]

Zapata has shown, without dispute, that there are over 40 witnesses resident in the United States (principally in Florida, Louisiana and Texas), there are no fact witnesses in England, and the depositions of Unterweser's managing director and of every one of the members of Unterweser's tug and riding crews have been taken. Everything that happened in preparing for the tow, on the tow, and in returning the CHAPARRAL to the Mississippi for repairs happened within 400 miles of Tampa.

Zapata's attorneys have devoted an enormous amount of time in investigating the casualty involved in this suit, interviewing numerous lay witnesses, engaging and consult-

---

[22] An illustrative case is *Hawaii Credit Card Corp.* v. *Continental Credit Card Corp.*, 290 F.Supp. 848 (D.C. Hawaii 1968). Plaintiff filed suit for breach of franchise agreement. Defendant filed motion to dismiss on ground of exclusive forum clause (California courts). Court denied motion, holding (851-852):

> "This court, as did . . . the Second Circuit in Wm. H. Muller & Co. v. Swedish American Line Ltd., . . . holds that the enforceability of such a venue agreement as is involved here depends upon its reasonableness. Under the setting of this particular case where apparently the target of defendants' agreements and actions was the credit card business of Hawaii, *where many witnesses are residents of Hawaii and most evidence as to the acts complained of apparently is to be found in Hawaii,* this court comes to the conclusion *that the jurisdictional agreement was unreasonable and adherence of the parties to that agreement should not here be given effect.*" (emphasis added)

ing with experts, preparing pleadings, motions, the taking of 35 oral depositions, researching the law, and preparing and filing briefs. Prior to Unterweser's appeal to the Fifth Circuit, Zapata's attorneys collectively have spent over 100 days in connection with the foregoing. In addition, Zapata has spent over $15,000 (not counting attorneys' fees) for deposition costs, interpreters' fees, witnesses' expenses, photostating of documents, investigation expenses, and travel and lodging costs. (App. 155)

The district court, after considering Unterweser's motion to decline jurisdiction of Zapata's *first* filed suit on grounds of forum non conveniens, found ". . . The balance of conveniences here is not strongly in favor of defendant [Unterweser] and Plaintiff's [Zapata's] choice of forum should not be disturbed.[23] The same court, in denying Unterweser's motion to stay the limitation case and enjoining Unterweser from prosecuting the London suit, said: "The balance of convenience is *strongly* in favor of litigation in this forum [Tampa] *initially* and to allow the same action to be prosecuted simultaneously elsewhere [London] would cause inequitable hardship."[24]

This finding that the "balance of convenience is *strongly* in favor of litigation in this forum" is supported by substantial and undisputed evidence.[25] Appendix A, infra, contains a Summary of the Balance of Convenience.

---

[23] Pet., App. C, C-4. Unterweser's criticism (Pet. 17) of this finding of the district court, on *Unterweser's motion to decline jurisdiction on forum non conveniens,* is not justified. Since Unterweser's motion asked the court to decline jurisdiction on forum non conveniens grounds, the district court quite properly considered *forum non conveniens* law. *Gulf Oil Corp.* v. *Gilbert,* 330 U.S. 501 (1947).

[24] Pet., App. D, D-6.

[25] In opposing Unterweser's motion to stay, Zapata filed affidavits which set forth in detail the convenience factors which the district court considered in ruling on Unterweser's motion to stay.

Zapata would be seriously inconvenienced if relegated to the English court. To give effect to the forum clause would be unreasonable. At the very least, the convenience factors show the court did not abuse its discretion in denying Unterweser's motion to stay, and in determining that all the controversies should be tried in Unterweser's limitation action.

An American citizen, under the circumstances of this case, should not be denied access to its own courts.

THERE IS NO CONFLICT OF DECISIONS

National Equipment Rentals Ltd. v. *Szukhent*, 375 U.S. 311 (1964).

As its first reason for granting the writ, Unterweser says the decision of the court of appeals *irreconcilably* conflicts with this Court's decision in *National Equipment Rentals* v. *Szukhent*, in which Mr. Justice Stewart noted:

> "The only question now before us is whether the person upon whom the summons and complaint were served was 'an agent authorized by appointment' to receive the same . . ."[26]

and went on to hold: ". . . we have concluded that Florence Weinberg was 'an agent authorized by appointment . . . to receive service of process,' and accordingly we reverse the judgment before us."[27] In discussing the decision Justice Stewart said: ". . . *it is settled . . . that parties to a contract may agree in advance to submit to the jurisdiction of a given court. . . .*" But not even the principle mentioned in that decision is involved, much less disputed, by the parties, or denied by the court of appeals in this case. And there is not the hint of a question as to the authority of the person served with process in Unterweser's case to "receive the same". Even Judge Wisdom, dissenting from the panel decision of the court of appeals, recognized the

---

[26] 375 U. S. at 313

[27] ibid. 314

irrelevance of *Szukhent* with which Unterweser would create a certiorari-commanding conflict when he said:

> "*Szukhent* is not significant authority, however, because the Court was faced with the question whether New York courts had jurisdiction, *not whether other courts should decline jurisdiction.*"[28] (emphasis added)

Zapata submits that a cursory consideration of *Szukhent* is sufficient to show that the supposed conflict does not exist.

The Unterweser-asserted conflicts with decisions of the Second and Third circuits are equally illusory.

Wm. H. Muller & Co., Inc. v. *Swedish American Line Ltd.*, 224 F.2d 806 (1954).

Where there were (1) a Swedish shipowner (who had *not* started a limitation suit in the U. S.), (2) Swedish crewmembers all residing in Sweden, (3) most of the evidence available in the Swedish court, (4) an *exclusive* Swedish forum clause, (5) no American fact witnesses, (6) *undisputed showings that the Swedish court would apply the same measure of damages as American maritime courts, and (7) that limitation proceedings under Swedish law were no more restrictive than under American law,* the Second Circuit held the forum clause was not unreasonable and would be enforced.

Can it be seriously contended that a decision affirming a discretionary order in an American limitation proceeding *started* by a German tugowner who wants the case sent to England where there are no witnesses and the law would deprive the American owner of the damaged tow of a negligence remedy on the strength of a non-exclusive forum clause — is in conflict with *Muller*?

---

[28] Dissent from panel decision (Pet. App. A, A-27).

Zapata suggests that when the facts are so different — opposite on every vital point — it borders on the frivolous to assert a conflict, particularly when the Fifth Circuit decision which is supposed to conflict with *Muller* says: "But apart from the forum selection clause itself, the circumstances supported a retention and determination by the district court," and goes on to discuss all of the facts presented by this case showing that enforcement of this forum clause would be unreasonable.[29]

Central Contracting Co. v. *Maryland Casualty Co.*, 267 F.2d 341 (1966).

In *Central Contracting* v. *Maryland Casualty*, the Third Circuit had under consideration a suit by a subcontractor (Central) on a Pittsburgh public housing project against the general contractors' surety (Maryland). This was not, of course, a case in which Maryland Casualty had commenced a suit in Pittsburgh in such a way as to subject itself to the full equitable powers of the Pittsburgh court. The subcontract provided for exclusive jurisdiction in New York, the state of incorporation of two of the three general contractors. Enforcement was thought reasonable since the New York forum was only 400 miles from plaintiff's home office, and such affidavits as were filed did not "rise to the dignity of substantial evidence of unreasonableness." While holding *this* clause reasonable on *these* facts the Third Circuit pointed out that such a forum clause does not "oust the jurisdiction of the courts", and that either party will always have the "opportunity to present whatever evidence will move a court *in the particular circumstances not to decline to exercise its undoubted jurisdiction*". The Third Circuit said a forum clause should be enforced ". . . so long as there is no proof *that its provisions will*

[29] Pet., App. A, A-12, 13, 14.

put one of the parties to an unreasonable disadvantage . . ." (emphasis added).

The Tampa district court and the Fifth Circuit had proof that enforcement of Unterweser's forum clause would be unreasonable because it would deprive Zapata of a remedy for negligence, shrink the limitation fund by 94%, and shift the scene of the trial 4000 miles from the area where the operative facts occurred and dozens of witnesses live. Indeed, the Fifth Circuit adverted to these very factors in holding that ". . . the circumstances supported a retention and determination by the district court."[28]

Unterweser suggests that the decision in the courts below turned on mis-placement of the burden of proof.[29] The truth is that there was no proof submitted by Unterweser to counter Zapata's evidence of deprivation of remedy and extraordinary inconvenience. *Whoever* legally had the burden of going on with *proof* of reasonableness or unreasonableness, *Zapata shouldered the burden* and showed without contradiction that enforcement would be unreasonable.

Unterweser contends the Fifth Circuit erred "in determining that reasonableness of the forum provision can be determined solely by consideration of forum non conveniens". (Pet., 3, 17). This is an incorrect interpretation of the court of appeals' decision. In addition to consideration of the available evidence in the American forum, including 35 depositions already taken in the American litigation (Pet., App. A, A-12, A-13), the Fifth Circuit held: "The district court was entitled to consider that remanding Zapata to a foreign forum, with no practical contact

---

[28] Pet., App. A, A-12, 13, 14.

[29] Pet., 3, 17, 18, 22. Petitioner also says (Pet., 3) that the Fifth Circuit committed "fundamental error" in holding the Petitioner had the burden of showing the reasonableness of the stipulated forum.

with the controversy, could raise a bar to recovery by a United States citizen which its own courts would not countenance." Zapata's proof of deprivation of its remedy (for negligent towage) in the foreign forum has not been questioned by Unterweser.

To justify conflict certiorari, the conflict should be well defined. The rulings in conflict should be so far on the same state of facts that the decisions can truly be said to be on the same question.

Neither the *Szukhent, Muller* nor *Central Contracting* courts had the same question the Tampa district court had in this case. *Muller* was the closest, but its facts were diametrically *opposite* on every important factor.

There simply is no conflict.

NO QUESTIONS OF IMPORTANCE ARE INVOLVED

Apparently recognizing that the alleged conflict with *Szukhent, Muller* and *Central Contracting* will not withstand scrutiny, Unterweser suggests, in Reason 2 for granting a writ, that this is a case of far-reaching international consequence which this Court should use as a vehicle to harmonize or unify international maritime law. (Pet., 18-22)

Not so. This case is important to the parties because, by private standards, a lot of money is involved. But it arises in a fact context so unusual that its utility in determining the broad questions Unterweser suggests would necessarily be limited. This Court is presented with a situation complicated by forum non conveniens factors, and the fact that the party seeking enforcement of the forum clause has itself sought the jurisdiction of the court it now seeks to leave. And all of this comes up on the court of appeals' affirmance of the way in which the district court exercised

its undisputed discretion in a case of a class which has produced only 5 other cases on the court of appeals level in the last 16 years.[30]

Not even Unterweser suggests an unreasonable enforcement of a forum clause. The unreasonableness of enforcement of the London forum clause has been demonstrated to the satisfaction of the district court and the court of appeals. Even under the test Unterweser urges, Unterweser loses.

The underlying law is clear enough:

1. A limitation judge has the power and discretion of an equity chancellor to see that justice is done. He has the power to require the limitation plaintiff to try the whole controversy in his court and to enjoin the limitation plaintiff from litigating elsewhere. The exercise of his discretion to retain jurisdiction is not subject to challenge in absence of a showing of abuse.

2. United States courts will not enforce covenants pre-exonerating a tugowner from the consequences of his negligence.

3. United States courts will not send its citizens to foreign courts where they will be deprived of rights they would have in this country.

---

[30] The other cases are: *Wm. H. Muller & Co., Inc.* v. *Swedish American Line Ltd.*, 224 F.2d 806 (2nd Cir. 1955) (bill of lading case); *Carbon Black Export, Inc.*, v. *The S.S. Monrose*, 254 F.2d 297 (5th Cir. 1958) (bill of lading case); *Anastasiadis* v. *S.S. Little John*, 346 F.2d 281 (5th Cir. 1965), cert. den. 384 U.S. 920 (1966) (alien seaman's personal injury case); *Central Contracting Co.* v. *Maryland Casualty Co.*, 367 F.2d 341 (3rd Cir. 1966) (domestic surety bond case); and *Indussa Corp.* v. *S.S. Ranborg*, 377 F.2d 200 (2d Cir. 1967) (bill of lading case), overruling *Wm. H. Muller & Co., Inc.*, supra.

4. United States courts will not enforce a forum clause if the balance of convenience is strongly in favor of the American forum.

5. United States courts apply its maritime law to high seas torts, and in any event do not enforce exculpatory provisions void under its own maritime law, though valid under foreign laws, where the contract is performed at least in part in the United States.

Unterweser says this Court should clarify the "degree of comity owed foreign courts" and the extent to which "United States courts impose its so-called 'public policy' upon international commercial transactions". (Pet. 21-22) This Court has expressed itself on these questions in unambiguous terms, where, *in a case like this, the contract was to be performed in part in the United States.*[31] In *The Kensington,* 183 U.S. 263, the ship owner sought to enforce provisions exonerating it from liability for its own negligence. Such provisions were valid under Belgian law for which the contract stipulated. This Court *refused* enforcement on grounds of public policy, holding neither *comity* nor the will of the parties can set at naught the public

[31] The towage contract called for performance in the United States. Extensive preparations for the voyage were made on the CHAPARRAL, jacked up near Venice, La., on the Mississippi. There plans for the voyage were made by Unterweser's and Zapata's representatives. Unterweser's Port Captain (from Germany) and the BREMEN's Master inspected the CHAPARRAL and made towing gear arrangements. Contract called for Zapata to furnish Unterweser pre-departure seaworthy certificate for CHAPARRAL, Marine Surveyor was employed by Zapata to inspect CHAPARRAL. This was done, and certificate delivered to Unterweser's Port Captain. Contract called for Zapata to engage and pay for pilots required to navigate CHAPARRAL and BREMEN from Venice, La., to the Gulf of Mexico — which it did. Contract called for tug hire to be paid Unterweser at New York bank. (App. 153-154).

policy of the United States. As the Court summed it up (at 269):

> "The contention amounts to this: where a contract is made in a foreign country, *to be executed at least in part in the United States*, the law of the foreign country, either by its own force or in virtue of the agreement of the contracting parties, must be enforced by the courts of the United States, even although to do so requires the violation of the public policy of the United States. To state the proposition is, we think, to answer it. It is true, as a general rule, that the *lex loci* governs, and it is also true that the intention of the parties to a contract will be sought out and enforced. But both these elementary principles are subordinate to and qualified by the doctrine *that neither by comity nor by the will of the contracting parties can the public policy of a country be set at naught.*" (emphasis added)[32]

No question of comity is involved here.

"Reason 2" is an attempt by Unterweser to surround a negligent towage case with an aura of international importance on a high policy level. Unterweser requests this Court to enunciate principles of law in areas in which the law is clear — in its efforts to resolve an issue (retention of jurisdiction) that turns on the particular facts of the case. Here the *facts* fully justified the exercise of the district court's lawful discretion in its decision that the whole controversy should be tried in Unterweser's own limitation proceeding.

"Reason 2", analyzed, is no reason for granting the writ.

---

[32] In accord: *Oceanic Steam Nav. Co.* v. *Corcoran*, 9 F.2d 724 (2nd Cir. 1925), relying on *The Kensington*, supra.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

JAMES K. NANCE
and
DEWEY R. VILLAREAL, JR.
Attorneys for Respondent

OF COUNSEL:

BAKER & BOTTS
3000 One Shell Plaza
Houston, Texas 77002

and

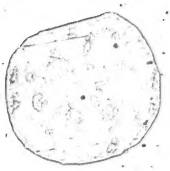
FOWLER, WHITE, GILLEN,
HUMKEY, KINNEY &
BOGGS, P.A.
P. O. Box 1438
Tampa, Florida 33601

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of this Opposition Brief have been furnished by airmail postage prepaid to David C. Kerr and Jack C. Rinard of Macfarlane, Ferguson, Allison & Kelly, 512 Florida Avenue, P. O. Box 1531, Tampa, Florida 33601 and to Warren M. Faris and J. Y. Gilmore, Jr., of Faris, Ellis, Cutrone, Gilmore and Lautenschlaeger, 1207 Whitney Building, New Orleans, Louisiana 70130, Attorneys for Petitioner, this 25th day of September, 1971.

Dewey R. Villareal Jr.

DEWEY R. VILLAREAL, JR.,
Attorney for Respondent



APPENDIX A

SUMMARY OF

BALANCE OF CONVENIENCES

SUMMARY OF BALANCE OF CONVENIENCES

Listed below are the convenience factors that were before the district court when it passed on Unterweser's motion to stay filed in the limitation action.

The reasonable conclusion to be reached from a consideration of these factors is that Zapata would be very seriously inconvenienced if it were relegated to the English court. At the very least these factors show that the district court did not abuse its discretion in denying Underweser's motion to stay and in deciding to try this dispute in the American court.

Factors Supporting Trial in the United States

The following factors (all shown in Zapata's undisputed affidavits) will make trial in the United States substantially more convenient (App. 50-57; 144-157):*

Zapata's Witnesses

1. There were seven employees of Zapata and one employee of a catering company on board the CHAPARRAL during the voyage. They are American citizens whose permanent addresses are in the Gulf Coast area of the United States. They are Oscar Willard, Wilton Johnson, Oscar W. Paul, Kenneth Price, Billy C. Burke, Earl B. Richie, Nolan B. Gamble and L. J. Fruge (catering company employee), all of whose depositions have been taken in Zapata's first filed suit. These depositions were noticed and taken by both Unterweser and Zapata.

---

*"App." refers to printed appendix filed in the Fifth Circuit, which has been certified to this Court.

2. The following employees of Zapata:

(a) Hoyt Taylor, Vice President and Chief Engineer;

(b) L. V. Whittington, Manager of Operations;

(c) Wiley C. Fenner, Senior Drilling Superintendent; and

(d) James Booth, Engineer.

These four persons reside in Houston, Texas. Their testimony is material on the plans and preparations for the voyage in question and on the question of the seaworthiness of the CHAPARRAL.

3. Noel Thompson, resident surveyor for Salvage Association, London, who resides in New Orleans, Louisiana, and Captain John H. Hellendoorn, staff marine surveyor for Salvage Associtaion, London, who resides in New Jersey.

These two men participated in the pre-voyage survey of the CHAPARRAL. Their testimony is material on the plans and preparations for the voyage in question and on the question of the seaworthiness of the CHAPARRAL. Their depositions were noticed and taken by both Unterweser and Zapata.

4. A representative of Breit Engineering Company of New Orleans, Louisiana, a naval architectural firm, who has knowledge of the stability of the CHAPARRAL.

5. Joseph Tynan, Marine surveyor, resident of New Orleans, Louisiana, who made a post-casualty damage survey of the CHAPARRAL at the request of Zapata.

6. Sam Bryan of Shilstone Testing Laboratories, metallurgist residing in Houston, Texas, who has participated in certain metallurgical testings of the damaged portions of the three legs of the CHAPARRAL.

7. Zapata expects to call several representatives of R. G. LeTourneau, Inc., which built the CHAPARRAL and delivered it to Zapata in the Spring of 1966, to testify concerning the construction of the CHAPARRAL. They are Gulf Coast residents.

8. Zapata expects to call certain workmen of R. G. LeTourneau, Inc., who carried out work on the CHAPARRAL in preparation for the voyage in question, to testify concerning such work and the seaworthiness of the rig. They are Gulf Coast residents.

9. Several representatives of R. G. LeTourneau, Inc., who will testify as to the damage repairs, the necessity therefor, and the reasonableness thereof, which were performed by R. G. LeTourneau, Inc. at its facility in Vicksburg, Mississippi, and other places on the Mississippi River. The three self-elevating legs of the CHAPARRAL were lost in the subject casualty of January 9, 1968, and LeTourneau was engaged by Zapata to manufacture, assemble, and install replacements for these legs. These witnesses are Gulf Coast residents.

10. A. Holm-Andersen, marine surveyor and tug valuation expert residing in New Jersey, will be called as a witness for Zapata as to the value of the M/S BREMEN, and Jack Mowbray, tug valuation expert of New York City, will also be called as a witness for Zapata as to the value of the M/S BREMEN.

11. Zapata employed a Tampa photographer to take pictures of the damaged condition of the CHAPARRAL. He will be called as a witness.

12. Other witnesses whose testimony is only available in the United States pertaining to the damages sustained by Zapata are representatives of:

a. Davis Transport, Inc., of Houston, Texas.

b. Bailey B. Line, Inc., of Metairie, Louisiana.

c. Construction Services, Inc., of Houma, Louisiana.

d. General Welding Supply Company of Tampa, Florida.

e. Pemco Welding, Inc., of Belle Chasse, Louisiana.

f. Specific Offshore Equipment Company of Houston, Texas.

g. Gulf Mississippi Marine Corporation of New Orleans, Louisiana.

h. Crescent River Pilots Assn. of New Orleans, Louisiana.

i. Associated Branch Pilots of New Orleans.

j. Statton & Statton Co., Inc., of Morgan City, Louisiana.

k. Misener Marine Constructions, Inc., of St. Petersburg, Florida.

l. Hendry Corporation of Tampa, Florida.

m. Pass-a-Grille Marina Inc., of St. Petersburg Beach, Florida.

n. J. W. Appley & Son., Inc., of St. Petersburg, Florida.

o. Wilson M. Hubbard Enterprises, of Pass-a-Grille Beach, Florida.

These persons and companies have furnished various services, equipment, and supplies in connection with repair of the damages sustained by Zapata. These witnesses will be called by Zapata to establish its damages.

UNTERWESER'S AMERICAN WITNESSES

The following American residents were engaged by Unterweser, following the casualty, and they may reasonably be expected to be called as witnesses by Unterweser in the American proceeding:

1. Rush Johnson and J. R. Bencal, two marine surveyors, engaged by Unterweser to survey the post-casualty damages to the CHAPARRAL. They reside in Houston, Texas.

2. Representatives of Pittsburgh Testing Laboratories at Tampa, Florida, and Pittsburgh, Pa., engaged by Unterweser to perform certain metallurgical tests on parts of the damaged legs of the CHAPARRAL. These testing experts reside in Flordia and Pennsylvania.

3. Unterweser employed a photographer to take photographs of the damaged condition of the CHAPARRAL. He resides in Tampa, Florida.

4. Unterweser engaged Thomas A. Addison, surveyor, to survey the damaged towing gear of the M/S BREMEN. He resides in Tampa, Florida.

5. Harry W. Reineke, marine surveyor and naval architect in the City of New Orleans, Louisiana. He was employed by Unterweser's representatives to examine the M/S BREMEN for valuation purposes. His affidavit as to value appears as Exhibit "A" to Unterweser's limitation complaint in Case No. 68-290 Civ.-T.

To be put on the scale in determining the "balance of convenience" are the inconveniences Unterweser would encounter in the American court. In this connection it is instructive to consider what Unterweser has asserted:

1. In Unterweser's combined motions to dismiss for lack of jurisdiction, to decline jurisdiction, or to stay, which were filed in Zapata's first filed suit, it is stated: "That in the alternative, in light of matters set forth in the affidavit of Eric von Aswegen, annexed hereto as "Exhibit A", the court should decline to assume jurisdiction over the within cause on the ground of *forum non conveniens.*" (App. 20) In Mr. von Aswegen's affidavit, it is stated that the M/S BREMEN was constructed in West Germany and is of German registry; that the officers and crew of the M/S BREMEN are of German nationality; that Unterweser is a German corporation; and that the Tampa District Court "constitutes an unaccessible and inconvenient forum insofar as Unterweser Reederei GMBH is concerned." His affidavit further states: "that the location of the foreign forum selected by the parties under and pursuant to the aforementioned towage contract, copy of which is attached hereto as Affiant's Exhibit No. 1, namely, London, England, constitutes the *'balance of convenience'* insofar as the relative positions of the parties are concerned." (App. 22-23). There were no other affidavits filed by Unterweser in that proceeding.

2. In Unterweser's motion to stay filed its limitation action, and the only one involved in this appeal, there is no mention of the United States District Court at Tampa as an *inconvenient* forum. *Its motion to stay is bottomed on the London forum clause, and no affidavits were filed in support of that motion.* (App. 205). (emphasis added)

The dissenting opinion to the panel decision of the Fifth Circuit (Pet. App. A, A-42 mentions ". . . most of Unterweser's witnesses reside in Germany — the twenty-three

crew members of the BREMEN, Von Aswegen, Managing Director of Unterweser, *personnel from the builders of the Bremen and the independent contractors who outfitted the vessel, individuals with companies for whom Bremen has previously towed.*" There is nothing whatsoever in the record to indicate Unterweser has any plan to call any of the persons mentioned in the italicized quotation as witnesses. *In any event, Zapata has stipulated that the BREMEN was properly designed, properly constructed, and properly outfitted, and Unterweser need not produce witnesses in Tampa to prove these facts.***

In considering the inconveniences to Unterweser the question of evidence of Unterweser's crew must of course be considered. In this connection it should be remembered that the testimony of the German crew of the BREMEN, the German riding crew of the CHAPARRAL, and Managing Director von Aswegen has been taken by deposition and preserved for the trial of the case in the American court. The oral depositions of these twenty-eight men have been taken in accordance with traditional admiralty practice, because, as is common knowledge, crew members are hard to produce in person at most trials.

ZAPATA'S INCONVENIENCES

Also to be put on the scale in determining the "balance of convenience" are the inconveniences of Zapata if the case is tried in the London court:

1. The attorneys for Zapata in the American court, Dewey R. Villareal, Jr., of Tampa, Florida, and James K. Nance of Houston, Texas, have devoted an enormous amount of time in investigating the casualty in-

**See p. 39, Supplemental Brief of Zapata's filed in Fifth Circuit, which has been certified to this Court.

volved in this suit, interviewing numerous lay witnesses, engaging and consulting with experts, preparing pleadings, motions, the taking of 35 oral depositions, researching the law and preparing and filing briefs. Prior to this appeal, Messrs. Villareal and Nance, attorneys for Zapata, collectively spent over 100 days in connection with the foregoing. In addition, Zapata has spent over $15,000 (not counting attorneys' fees) for deposition costs, interpreters' fees, witnesses' expenses, photostating of documents, investigation expenses, and travel and lodging costs. In preparation for the trial in the American court, 35 depositions, consisting of some 2170 pages of testimony, have been taken. More than 700 documents have been marked as exhibits in the course of these depositions. If the matter is tried in London, Zapata's American lawyers will have to attempt to communicate by letter, or conference, or probably both, to Zapata's London barristers and solicitors the information, gleaned in hundreds of hours of investigation, which is not in the depositions. The expense involved would be very heavy. (App. 155)

2. Unless Unterweser's motion to stay is denied and Unterweser is enjoined from further proceeding with its London suit pending final determination of the Tampa proceedings, if the London suit goes to trial, Zapata hopes to produce in person, at that trial:

Zapata employees:

1. Hoyt Taylor, Vice President and Chief Engineer
2. L. V. Whittington, Manager of Operations
3. Wiley C. Fenner, Senior Drilling Superintendent
4. James Booth, Engineer
5. Oscar Willard, Maintenance Superintendent

6. Kenneth Price, Motorman

7. Billy C. Burke, Mechanic-Electrician

Others

8. Noel Thompson, Marine Surveyor

9. John H. W. Hellendoorn, Marine Surveyor

10. A representative of Breit Engineering Company, a naval architectural and engineering firm

11. A representative of R. G. LeTourneau, Inc., regarding the design and construction of the CHAPARRAL

12. A representative of R. G. LeTourneau, Inc., regarding work done in preparation for the voyage of the CHAPARRAL

13. Sam Bryan, Metallurgist

14. Joseph Tynan, Marine Surveyor

These 14 witnesses reside in the United States Gulf area, wtih the exception of Hellendoorn who resides in New Jersey. They are material witnesses as to plans and preparations for, or the events of the voyage, or the condition of the CHAPARRAL before or after the voyage.

The round trip air fare, Houston to London, tourist class, is $572.80. The round trip fare, Tampa to London, tourist class, is $527.20. In contrast, a round trip air fare, Houston to Tampa, tourist class, is $109.20. The cost per day for a commercial hotel plus meals in London is about $20. Zapata estimates the cost of air fares and lodging and subsistence incidental to producing the above-mentioned witnesses at a London trial would be $10,000. (App. 156-157)

> 3. Zapata is engaged in offshore drilling operations at locations in the Indian Ocean, Gulf of Mexico, Danish North Sea, coastal waters of Africa and South America. Zapata witnesses, Taylor, Whittington, Fenner, Booth, and Willard, are key men of managerial status in the Zapata organization, and it would be extremely inconvenient and disruptive of Zapata's offshore drilling operations to send them to London to give evidence. (App. 157)

The district court's finding that the "balance of convenience is strongly in favor of litigation in this forum" (Pet., App. D, D-6) is supported by substantial and undisputed evidence.

U. S.
FILED
DEC 23 1971
ROBERT SEAVER, CLER

IN THE

Supreme Court of the United States

No. 71-322

In the Matter of the Complaint of
UNTERWESER REEDEREI, GMBH, for Exoneration
From or Limitation of Liability as Owner
of the M/S BREMEN

UNTERWESER REEDEREI, GMBH
Petitioner,
v
ZAPATA OFFSHORE COMPANY
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

DAVID C. G. KERR
of MACFARLANE, FERGUSON,
ALLISON & KELLY
Post Office Box 1531
Tampa, Florida 33601
Counsel for Petitioner

JACK C. RINARD
of MACFARLANE, FERGUSON,
ALLISON & KELLY
Post Office Box 1531
Tampa, Florida 33601
Of Counsel for Petitioner

WARREN M. FARIS and
J. Y. GILMORE, JR.
of FARIS, ELLIS, CUTRONE,
GILMORE & LAUTENSCHLAEGER
1207 Whitney Building
New Orleans, Louisiana 70130
Of Counsel for Petitioner

FREE PRESS PUB. CO., INC., TAMPA, FLORIDA

INDEX

	Page
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Statutes Involved	2
Statement of the Case and Facts:	
The Towage Contract	3
The Collapse of the CHAPARRAL	4
The Initial Proceeding	5
The London Action	5
Limitation Proceeding	6
The Opinion of the Court of Appeals	8
Summary of Argument	9
Argument:	
I Effect should be given to the choice of forum clause in a private extra-national towage contract executed by parties of different nationalities and of equal bargaining power.	13
II The burden of proving a forum clause unreasonable rests on the party seeking to avoid enforcement and unreasonableness is not determined by application of *forum non-conveniens.*	20
III The decision below rejects principles of uniformity and comity in international law and fosters distrust of American courts and contractual commitments involving American citizens.	30
Conclusion	34

CITATIONS

Cases	Pages
Aamco Automatic Transmissions, Inc. v. Hagenbarth, 296 F.Supp. 1142 (E.D. Pa. 1968)	15
Aetna Insurance Company v. United Fruit Company, 304 U.S. 430 (1938)	30
Bisso v. Inland Waterways Corporation, 349 U.S. 85 (1955)	9, 24, 26
Carbon Black Export, Inc. v. The S. S. Monrosa, 254 F.2d 297 (5th Cir. 1958)	8, 9, 10, 14, 15, 26
Canadian Filters (Harwich) Ltd. v. Lear Siegler, Inc., 412 F.2d 577 (1st Cir. 1969)	30
Central Contracting Co. v. C. E. Youngdahl & Co., 209 A.2d 810 (Pa. 1965)	18
Central Contracting Co. v. Maryland Casualty Co., 367 F.2d 341 (3rd Cir. 1966)	11, 17, 19
Compagnie Tunisienne Navigation, S.A. v. Compagnie d'Armement Maritime, [1970] 3 W.L.R. 389 (H. L.)	25
Dixilyn Drilling Corporation v. Crescent Towing and Salvage Co., 372 U.S. 697 (1963)	24, 26
Geiger v. Keilani, 270 F.Supp. 761 (E.D. Mich. 1967)	15
Gilbert v. Burnstine, 174 N.E. 706 (N.Y. 1931)	18
Gulf Oil Corporation v. Gilbert, 330 U.S. 501 (1947)	19
Hawaii Credit Card Corp. v. Continental Credit Card Corp., 290 F.Supp. 848 (D. Hawaii 1968)	15
Indussa Corp. v. S/S Ranborg, 377 F.2d 200 (2d Cir. 1967)	10, 15
Krenger v. Pennsylvania R. Co., 174 F.2d 556 (2d Cir. 1949)	18, 19

CITATIONS (Cont'd)

Pages

Mattiessen v. National Trailer Convoy, Inc.,
294 F.Supp. 1132 (D. Minn. 1968) 15

Mittenthal v. Mascagni,
66 N.E. 425 (Mass. 1903) 18

National Equipment Rental v. Szukhent,
375 U.S. 311 (1964) 10, 14

National Equipment Rental Ltd. v. Centra Cast Co.,
270 F.Supp. 999 (E.D. N.Y. 1966) 15

National Equipment Rental v. Reagin,
338 F.2d 759 (3d Cir. 1964) 17

San Juan Hotel Corporation v. Lefkowitz,
277 F.Supp. 28 (D. Puerto Rico 1967) 15

Seaboard Coastline R.R. v. Tennessee Corp.,
421 F.2d 970 (5th Cir. 1970) 26

Standard Oil Company v. United States,
340 U.S. 54 (1950) 30

Tzortzis v. Monark Line A/B,
[1968] 1 All. E.R. 949 33

United States v. Roscoe-Ajax Construction Co.,
246 F.Supp. 439 (N.D. Cal. 1965) 15

Wm. H. Muller & Co. v. Swedish American Line Ltd.,
224 F.2d 806 (2nd Cir. 1955) 10, 15

The Eleftheria, P. 94 (1970), 1 Lloyd's Rep. 23,
(1969), 2 All. E.R. 641 (1969) 23

Statutes

Carriage of Goods by Sea Act, 46 U.S.C.
§§ 1300-15, 46 Stat. 1207 ..... 10, 15

Title 6, U.S.C. §185, 49 Stat. 1480 7

CITATIONS (Cont'd)

Miscellaneous **Pages**

Collins, *Arbitration Clauses and Forum Selecting Clauses in the Conflict of Laws: Some Recent Developments in England,* Journal of Maritime Law and Commerce (Vol. 2, No. 2, p. 363, Jan. 1971) 25

Collins, *Forum Selection and an Anglo-American Conflict—The Sad Case of the CHAPARRAL,* International and Comparative Law Quarterly (Vol. 20, p. 550, July 1971) 19, 25, 32

Denning, *Choice of Forum Clauses in Bills of Lading,* Journal of Maritime Law and Commerce (Vol. 2, No. 1, p. 17, Oct. 1971) 16, 22

Ehrenzweig, Conflict of Laws, §41, 153 (1962) 19

Mendelsohn, *Liberalism, Choice of Forum Clauses and the Hague Rules,* Journal of Maritime Law and Commerce (Vol. 2, No. 3, April 1971) 16

Reese, *The Contractual Forum: Situation in the United States,* 13 Am.J.Com.L. 187 (1964) 9

Restatement (Second) of Conflict of Laws, §80 (Proposed Off. Draft, 1967) 19

IN THE

Supreme Court of the United States

No. 71-322

In the Matter of the Complaint of
UNTERWESER REEDEREI, GMBH, for Exoneration
From or Limitation of Liability as Owner
of the M/S BREMEN

UNTERWESER REEDEREI, GMBH
Petitioner,

v

ZAPATA OFFSHORE COMPANY
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINION BELOW

The Opinion of the Court of Appeals (App. 229) is reported at 428 F.2d 888. The En Banc Opinion of the Court of Appeals (App. 283) is reported at 446 F.2d 907.

JURISDICTION

The Judgment of the Court of Appeals on Rehearing En Banc was entered June 28, 1970. (App. 293). The Petition for Writ of Certiorari, filed September 1, 1971, was granted November 9, 1971. The jurisdiction of the Supreme Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Is a forum, designated by contract for resolution of disputes by parties of equal bargaining power, *per se* invalid as a violation of any legitimate public policy of the United States?

2. If forum clauses are *per se* valid, did the Court of Appeals commit fundamental error in determining that (a) reasonableness of the clause must be determined solely by exclusive application of *forum non-conveniens,* and (b) in holding that the party seeking to abide by the contract has the burden of showing its reasonableness?

3. In frustrating the contractual expectations of the parties, did the Court below create uncertainty in private international law and distrust of the role of courts in extra-national transactions involving a United States citizen as one party?

STATUTES INVOLVED

No specific statutes, constitutional provisions, or rules of procedure are involved in the determination of the questions presented in this case.

STATEMENT OF THE CASE AND FACTS

This litigation began with a Complaint in Admiralty filed by ZAPATA against BREMEN and its owner, UNTERWESER (hereinafter the "initial action"). ZAPATA's Complaint prayed for damages sustained by the barge CHAPARRAL allegedly caused by the negligence of UNTERWESER and BREMEN while CHAPARRAL was in tow of BREMEN en route to the Adriatic from Venice, Louisiana.[1]

UNTERWESER filed a motion in the District Court requesting that the Court decline jurisdiction of the cause or alternatively stay prosecution of the cause pursuant to a forum provision contained in the Towage Contract. (App. 19). Before this motion was heard by the District Court, UNTERWESER initiated proceedings against ZAPATA in the High Court of Justice, London, England, in accordance with the Towage Contract. Thereafter, the District Court denied Unterweser's Motion for Stay and enjoined further prosecution of the London action.

The Towage Contract

The Towage Contract was the product of an arms-length transaction ". . .made between two responsible

---

[1] BREMEN is a deep sea tug of 1200 gross tons, 7500 horsepower, 178 feet in length, 40 feet in beam, built and registered in Germany in 1967, manned by a crew of 23 German nationals. She is owned and operated by Unterweser Reederei, GmbH (Unterweser), a corporation organized under German law and domiciled in Bremen, Germany. CHAPARRAL is a self-elevating drilling barge of 4,750 gross tons, documented at Houston, Texas on January 2, 1968. While under tow, she was manned by a crew and a Master of Zapata Offshore Company (Zapata). CHAPARRAL is 180 feet in length and 205 feet in breadth; she is equipped with three jack-up legs, each 435 feet high. Zapata is a Delaware corporation, with its principal place of business in Houston, Texas.

corporations involved in an international transaction." (App. 246; Opinion, Wisdom, J., dissenting). The voyage contemplated by the Towage Contract was to have traversed numerous jurisdictions from the Mississippi River to the Adriatic Sea, and accordingly was subject to the intermittent civil jurisdiction of numerous sovereigns.

Before contracting for the tow of CHAPARRAL, ZAPATA solicited bids from several ocean-towing companies. UNTERWESER's bid was the lowest. After being advised that its bid had been accepted, UNTERWESER was requested by ZAPATA to furnish a written towage contract for consideration. A contract was drafted by UNTERWESER in Bremen, Germany, and sent to ZAPATA in Houston, Texas. In place of the usual provision for German jurisdiction and German law which UNTERWESER customarily includes in its contracts, UNTERWESER specified an English forum. After consideration of the contract, ZAPATA made several changes, signed the contract in Houston, and returned it to UNTERWESER. UNTERWESER accepted and finally executed the contract in Bremen on November 3, 1967. (App. 21; 62).

The Collapse of the CHAPARRAL

On January 5, 1968, BREMEN departed Venice, Louisiana, and proceeded into the Gulf of Mexico with CHAPARRAL in tow. The flotilla was en route to the Adriatic when, during the early morning hours of January 9, 1968, in international waters (App. 22), the legs of the CHAPARRAL collapsed and fell into the sea. Thereafter, BREMEN rendered salvage services and, upon orders from ZAPATA, proceeded toward Tampa Bay, the nearest port of refuge.

Upon arriving in Tampa Bay on January 12, 1968, BREMEN was arrested by the United States Marshal and served with ZAPATA's Complaint seeking damages in the amount of $3,500,000 against BREMEN and UNTERWESER. (App. 7).

The Initial Proceeding

On January 29, 1968, UNTERWESER filed its Motion to Dismiss for Lack of Jurisdiction, or Alternatively, for Entry of an Order Declining Jurisdiction and/or Staying the Further Prosecution of [the Initial Proceeding]. (App. 19). This motion was based on paragraph 8 of the General Towage Conditions in the Towage Contract:

> Any dispute arising must be treated before the London Court of Justice. (App. 27).

The parties completed arrangements for security, ZAPATA ultimately accepting a letter of undertaking in the amount of $3,500,000; pursuant thereto, BREMEN was released from arrest on January 26, 1968.[2]

London Action

In accordance with the Towage Contract, UNTERWESER instituted action against ZAPATA in the High Court of Justice in London.[3] On February 21, 1968, the

---

[2] The letter of undertaking was issued under the signature of Lamorte, Burns & Co., Inc. One condition of the letter was that UNTERWESER gave up no rights in connection with any defenses to the action by ZAPATA; specifically mentioned were rights of UNTERWESER to challenge jurisdiction and to petition for limitation of liability. (App. 17).

[3] UNTERWESER's suit sought affirmative relief against ZAPATA for breach of the contract, damages for loss of towing gear, and for towage hire due.

High Court of Justice issued a writ of summons which was served upon ZAPATA on March 14, 1968. (App. 46; 48). ZAPATA appeared in the London action and moved to dismiss; its motion was predicated on three principal grounds: (1) the English Court was not a convenient forum; (2) proceedings between the parties had previously been commenced in the United States; and (3) the writ was not properly served. The High Court of Justice ruled that the writ of summons had been properly served, that it had jurisdiction and that the action should go forward. (Opinion, High Court of Justice, App. 206). ZAPATA immediately appealed the ruling to the English Court of Appeal. The ruling was affirmed, the Court of Appeals holding that the forum provision of the Towage Contract was reasonable and that no showing had been made by ZAPATA which would compel refusal to enforce the contractual expectations of the parties. (App. 215).

Limitation Proceeding

While ZAPATA was contesting the action in London, the parties prepared for argument on UNTERWESER's Motion to Decline Jurisdiction or for Stay of the initial action in Tampa. At oral argument, on April 29, 1968, UNTERWESER advised the District Court of the initiation of the London action. *UNTERWESER also offered that all security given to ZAPATA in the initial action would remain available to satisfy any relief granted in any action or counterclaim by ZAPATA in London.* Following oral argument, the District Court reserved ruling on UNTERWESER's Motion.

By July 2, 1968, almost six months following the occurrence of the casualty, the District Court had not ruled on UNTERWESER's Motion and UNTERWESER

was confronted with expiration of the six-month period for filing of a limitation proceeding in the United States (the casualty having occurred January 9, 1968). The High Court of Justice had held that UNTERWESER's London action was properly brought and that the Towage Contract should be enforced, but ZAPATA was appealing that decision. Faced with the possibility of adverse rulings in the District Court and in the English Court of Appeal, *and to protect its limitation rights*, UNTERWESER filed its limitation action. (App. 85). A bond for $1,390,000 was posted[4] and the District Court entered an Order in the limitation action staying the initial suit brought by ZAPATA. (App. 94; 97).

On July 23, 1968, the English Court of Appeal affirmed the ruling of the High Court of Justice (App. 215), and on July 29 (approximately 17 days following expiration of the statutory period for petitioning for limitation) the District Court ruled on UNTERWESER's Motion to Decline Jurisdiction or Stay in the initial action; its Order denied the relief requested. (App. 80).

After entry of the adverse appellate decision in the English proceeding, ZAPATA filed Motion for Injunction in the Tampa limitation proceedings seeking to enjoin UNTERWESER from further prosecution of the London action. (App. 118). UNTERWESER again sought to enforce the forum provision of the Towage Contract by filing a Motion to Stay the limitation action pending determination of UNTERWESER's London action against ZAPATA. (App. 205).

---

[4] This bond was filed in compliance with Title 46 U.S.C. § 185, 49 Stat. 1480, and the $1,390,000 was in addition to the $3,500,000 security furnished by the letter of undertaking.

The District Court, not viewing the provisions of the Towage Contract as relevant, denied UNTERWESER's Motion for Stay and at the same time granted ZAPATA's Motion and enjoined further prosecution of the London action. From this Order UNTERWESER appealed to the United States Court of Appeals for the Fifth Circuit.

The Opinion of the Court of Appeals

The Opinion of the United States Court of Appeals for the Fifth Circuit is ambiguous with respect to the grounds for affirmance; it first cited its holding in *Carbon Black Export, Inc. v. The S. S. Monrosa*, 254 F.2d 297 (5th Cir. 1958), cert. dismissed, 359 U.S. 180, rehearing denied, 359 U.S. 999 (1959), quoting therefrom the following as representing the "majority view" (App. 239, n. 26):

> In essence, the motion [to decline jurisdiction] was based upon Clause 27 as buttressed by the doctrine of forum non-conveniens. Any consideration of such a question starts with the *universally accepted rule that agreements in advance of controversy, whose object is to oust the jurisdiction of the Courts, are contrary to public policy and will not be enforced.* (Emphasis supplied).

In addition to relying on *Carbon Black*, the Court struck down the forum clause as unreasonable (and thus only unenforceable) on the basis of *forum non-conveniens:*

> It is within the sound discretion of the District Court to decline jurisdiction on the basis of forum non-conveniens. But apart from the forum selection clause itself the circumstances supported a retention and determination by the District Court.

> Though the towage contract envisioned a long voyage with potential exposure to the jurisdiction of numerous states, the flotilla never escaped the Fifth Circuit's mare nostrum, and the casualty occurred in close proximity to the District Court. (Footnotes omitted) (App. 241-242).

Finally, the Court, placing great emphasis on the fact that ZAPATA was a United States citizen, held "[t]he discretion of the District Court to remand the case to a foreign forum was consequently limited", "noting" that there were "*indications*" that ZAPATA's substantive rights would be "materially affected" if the dispute was litigated in an English Court since the Towage Contract contained certain "exculpatory provisions" which, ". . .are apparently contrary to public policy and unenforceable in American courts", (footnote omitted) citing *Bisso v. Inland Waterways Corporation*, 349 U.S. 85 (1955) (App. 243) and also relying upon Reese, *The Contractual Forum: Situation in the United States*, 13 Am.J.Com.L. 187, n. 33 (1964):

> [E]ffect should be denied the clause if there is reason to believe that the courts of the selected state would deal unfairly with the plaintiff or would deny him relief to which he is entitled. (App. 244).

Upon Rehearing, En Banc, a divided Court (8 to 6) affirmed, per curiam, and adopted the opinion of the original panel. (App. 283).

SUMMARY OF ARGUMENT

The decision of the Court of Appeals is ambiguous. It cannot be determined whether the Court, relying on *Carbon Black Export, Inc. v. The SS Monrosa*, 254 F.2d 297 (5th Cir. 1958), held that the forum provision in the Towage Contract was *per se* invalid as an attempt to oust the court from its jurisdiction, or whether (after

testing the forum provision solely against criteria of *forum non-conveniens*) held that the provision was unreasonable and therefore only unenforceable. Upon either basis the decision is erroneous. Reliance upon *Carbon Black* is unwarranted in view of significant factual and legal distinctions; further, such reliance ignores commercial realities and principles of contract and comity in international business relations. Testing the forum provision by exclusive application of *forum non-conveniens* leads to the fundamental error committed in both lower courts: casting the burden of showing reasonableness upon UNTERWESER. Law and logic require that ZAPATA, the party seeking to escape its contractual committment, must bear the burden of showing that the forum provision is *unreasonable*. Moreover, exclusive application of *forum non-conveniens* disregards the fact that the forum clause was bargained-for consideration.

I. If the Court of Appeals means that forum provisions are *per se* invalid, the decision contravenes recognition of the *prima facie* validity of such clauses by this Court in *National Equipment Rental v. Szukhent*, 375 U.S. 311 (1964). The Court of Appeals' additional reliance on *Indussa Corp. v. S/S RANBORG*, 377 F.2d 200 (2nd Cir. 1967), in which the Court overruled its prior decision in *Wm. H. Muller & Co. v. Swedish American Line Ltd.*, 224 F.2d 806 (1955), was misplaced. *Indussa's* rejection of *Muller* was based solely upon the statutory prohibitions of the Carriage of Goods by Sea Act, 46 USC §§1300-15, 49 Stat. 1207 (COGSA), necessitated by the adhesive character of bills of lading. COGSA was applicable both to *Muller* and to *Carbon Black*; both decisions were dictated by COGSA and not by principles of general contract law. The argument

that forum clauses generally, (and particularly where the contract was potentially subject to the intermittent jurisdiction of several soverigns), are designed to oust a court's jurisdiction is no longer valid and ignores compelling considerations of international commercial relations. A forum clause negotiated under the circumstances in the present case is not *per se* an "affront to the judicial power, which must be stricken down." *Central Contracting Co. v. Maryland Casualty Co.*, 367 F.2d 341 (3rd Cir. 1966).

II. The reasonableness of a contractual forum provision arrived at through arms-length negotiation by parties regularly engaged in international transactions can not be determined through concepts of "convenience," "national origin," or pure jurisdictional "power." Application of *forum non-conveniens* ignores the fact that *the* initial choice of forum was London - not Tampa: the former was contracted for - the latter fortuitous. The burden of showing that the contracted forum is unreasonable must be on the party seeking to avoid contractual obligations, *not upon the party seeking to perform.* Forum provisions must be judged by facts existing at the time of contract and not on the basis of hindsight, fortuitous circumstances, pure convenience, or national origin of either party. This crucial distinction differentiating forum provisions from *forum non-conveniens* was recognized by Judge Wisdom in his dissent where he delineated the controlling standards applicable to testing the reasonableness of such clauses (App. 268-269): (1) Did the parties freely and intelligently enter into the agreement? (2) Would the stipulated forum, in rendering its decision, transgress an im-

portant public policy in the present forum? (3) Would the designated forum adjudicate the parties' dispute? (4) Is the designated forum *seriously* inconvenient for the trial of the action? American courts and especially this Court should approach forum clauses affirmatively, as have the English Courts in this case, that is, with a view to their *prima facie* enforcement absent: (1) a contract of adhesion, or (2) compelling and serious public policy considerations.

III. The Court of Appeals' decision fosters uncertainty in the field of international commercial transactions where United States citizens are a party, and distrust of United States courts stemming from application of out-dated concepts which substitute unbridled "jurisdictional discretion" based upon a combination of national origin and fortuitous circumstances for the contractual expectations of the parties. The suggestion that ZAPATA's rights would be prejudiced or that it would be treated "unfairly" in fulfilling its contractual committments, freely and voluntarily assumed, represents a rejection of international judicial comity and does not enhance or strengthen judicial or national sovereignty.

ARGUMENT

I

EFFECT SHOULD BE GIVEN TO THE CHOICE OF FORUM CLAUSE IN A PRIVATE EXTRA-NATIONAL TOWAGE CONTRACT EXECUTED BY PARTIES OF DIFFERENT NATIONALITIES AND OF EQUAL BARAINING POWER.

There is no dispute that the District Court had "jurisdiction" of ZAPATA's Complaint and UNTERWESER's Petition for Limitation of Liability; rather the question is whether or not the Court, having jurisdictional power, rightly exercised that power in the face of a forum provision constituting bargained-for consideration.

The Towage Contract evolved from arms-length negotiations between ZAPATA and UNTERWESER, and its provisions affected only the private interests of the contracting parties. Both knew that BREMEN and CHAPARRAL would traverse the civil jurisdiction of numerous countries.

As a matter of commercial practice, UNTERWESER's towage contracts ordinarily provide for exclusive German jurisdiction and the application of German law in the settlement of all disputes. As a contractual concession, UNTERWESER proposed the London forum as a neutral alternative which was accepted by ZAPATA.[5] UNTERWESER considered this provision

---

[5] It is interesting to note that the Daywork Drilling Contract (App. 299) between Zapata North Sea, Inc., and AGIP-S.p.A. Direzione Mincraria, covering the drilling to be performed in the Adriatic Sea provides for arbitration at London, England, and interpretation and construction of the agreement ". . . in accordance with the common law of England." (App. 310-311). The Daywork Drilling Contract is a portion of the supplemental documents filed in the Court of Appeal pursuant to their request on Rehearing En Banc.

fundamental to the agreement and would not have entered the Towage Contract but for the London forum provision. (App. 21-22).

The legal basis upon which the Court of Appeals affirmed the District Court is unclear.[6] Intially, the Court of Appeals apparently relies on its decision in *Carbon Black Export, Inc., v. S.S. Monrosa,* 254 F.2d 297 (5th Cir. 1958), for the proposition that forum clauses are *per se* illegal and intended to oust courts of jurisdiction. However, the Court compounds confusion in attempting to support its decision on two alternative grounds, *relating to enforceability,* which are inherently inconsistent with a ruling that the forum clause is *per se* invalid:

> (a) the District Courts' "discretion" when confronted with a forum clause which is "unreasonable" under a purported application of the doctrine of *forum non-conveniens* (App. 241); and
>
> (b) the existence of supposed "exculpatory provisions" in the Towage Contract which, according to the Court "are *apparently* contrary to public policy and unenforceable in American Courts." (App. 242-243, Opinion). (Emphasis supplied).

Insofar as the decision holds that forum provisions are *per se* invalid against public policy, it completely disregards this Court's recognition of the validity of such clauses in *National Equipment Rental v. Szukhent,* 375 U.S. 311 (1964), and decisions of other Circuits which recognize the *prima facie* validity of such provisions:

---

[6] See App. 248, Opinion, Wisdom J. dissenting.

> And, it is settled, as the courts below recognize, that parties to a contract may agree in advance to submit to the jurisdiction of a given court to permit notice to be served by the opposing party or even to waive notice altogether.
> 375 U.S. at 315-316.

The *Szukhent* decision has been implemented by a number of District Courts in recent decisions involving stipulated forum provisions. In all of these decisions the courts have held that such clauses are *per se* valid, to be rejected only when unreasonable under the circumstances. *See*: *United States v. Roscoe-Ajax Construction Co.*, 246 F.Supp. 439 (N.D. Cal. 1965) (Miller Act Prohibition); *National Equipment Rental Ltd., v. Centra Cast Co.*, 270 F.Supp. 999 (E.D.N.Y. 1967) (forum provision not *per se* invalid); *San Juan Hotel Corporation v. Lefkowitz*, 277 F.Supp. 28 (D. Puerto Rico 1967) (forum provision enforceable); *Geiger v. Keilani*, 270 F.Supp. 761 (E.D.Mich. 1967); *Hawaii Credit Corp. v. Continental Credit Card Corp.*, 290 F.Supp. 848 (D. Hawaii 1968) (forum provision enforceable when reasonable); *Matthiessen v. National Trailer Convoy, Inc.*, 294 F.Supp. 1132 (D.Minn. 1968) (enforceable if reasonable); *Aamco Automatic Transmissions, Inc. v. Hagenbarth*, 296 F.Supp. 1142 (E.D. Pa. 1968) (forum provision enforced).

The Court of Appeals attempts to support its application of *Carbon Black* by utilization of *Indussa Corp. v. S.S. Ranborg*, 377 F.2d 200 (2nd Cir. 1967). *Indussa* overruled *Wm. H. Muller & Co. v. Swedish American Line, Ltd.*, 224 F.2d 806 (2d Cir. 1955), in which the Court had held a forum provision calling for settlement of disputes in a Swedish court to be valid under the Carriage of Goods by Sea Act, 46 U.S.C. §§1300-15, 46 Stat. 1207 (COGSA). In relying upon the Second Circuit's

Indussa decision, the Court of Appeals fails to recognize that *Indussa* in overruling *Muller*, did so *solely* on the basis of the statutory prohibition of COGSA and not on principles of general contract law. The effect of *Indussa* was correctly analyzed in the original dissent. (App. 256-257):

> I must disagree with the majority's conclusion that Indussa Corporation v. S. S. Ranborg, 2 Cir. 1967, 377 F.2d 200, overrules this part of Muller. Indussa's decision not to enforce a forum clause derived from its view that the Carriage of Goods by Sea Act, 46 U.S.C. §§1300-15, where applicable, prohibited such clauses. COGSA did apply to Muller (as it did to Carbon Black) and for that reason Muller was overruled. "[T]he Muller court leaned too heavily on general principles of contract law and gave insufficient effect to the enactments of Congress governing bills of lading. . ." 377 F.2d at 202. Where COGSA does not apply as in this case, I believe Muller's "general principles of contract law" still lead to Muller's result. (Footnotes deleted).

This same distinction is ably discussed in Denning, *Choice of Forum Clauses in Bills of Lading*, Journal of Maritime Law and Commerce (Vol. 2, No. 1, p. 17, Oct. 1971), wherein the author raises serious questions concerning the desirability of even the COGSA prohibition.[7] Where COGSA is inapplicable, the Second Circuit recognizes that forum provisions under general contract law are enforceable and has characterized this Court's hold-

---

[7] Denning's article prompted a reply by Allen I. Mendelsohn: *Liberalism, Choice of Forum Clauses and the Hague Rules*, Journal of Maritime Law and Commerce (Vol. 2, No. 3, April 1971). Mendelsohn's defense of the COGSA forum clause restriction further emphasized the distinction by pointing out bills of lading are contracts of adhesion which require consideration of commercial and practical realities of a nature different from contracts arrived at through arms-length negotiations.

ing in *Szukhent* as evidencing ": . . , a federal policy in favor of upholding such clauses. . ." *National Equipment Rental, Ltd., v. Reagin,* 338 F.2d 759, 762 (1964). Similarly, the Third Circuit has held that reasonable forum clauses in contracts are enforceable and not ". . .an affront to the judicial power which must be stricken down." *Central Contracting Co. v. Maryland Casualty Co.,* 367 F.2d 341, 345 (1966).

Judged in the factual context of this case, the argument that forum clauses are intended to divest any Court of jurisdiction defies logic. The negotiations leading to execution of the Towage Contract contemplated a lengthy voyage traversing the waters of many jurisdictions. Both parties presumably anticipated a successful voyage and if they contemplated difficulties, neither could forsee where they might occur. The damage to the CHAPARRAL occurred in international waters and not within the jurisdiction of the District Court. BREMEN, on orders from ZAPATA, entered the Port of Tampa and was seized by the United States Marshal on arrival. Accordingly, the jurisdiction of the District Court is wholly fortuitous and neither party at the time of contract could have intended to divest the jurisdiction of the Tampa Court or of any Court along the route of the journey.

The forum provision in the Towage Contract was a compromise forming an essential part of the bargain, and, unlike standard provisions in bills of lading to which COGSA prohibitions apply, was negotiated between two independent parties sophisticated in international transactions. Under such circumstances, enforcement of forum provisions and the contractual expectations of the parties must be approached affimative-

ly with a view to giving effect to the written contract.[8] The logic and fundamental rationale underlying these principles was succinctly summarized in *Gilbert v. Burnstine,* 174 N.E. 706, 707 (N.Y. 1931):

> Contracts made by mature men who are not wards of the court should, in the absence of potent objection, be enforced. Pretexts to evade them should not be sought. Few arguments can exist based on reason or justice or common morality which can be invoked for the interference with the compulsory performance of agreements which have been freely made. Courts should endeavor to keep the law at a grade at least as high as the standards of ordinary ethics. Unless individuals run foul of constitutions, statutes, decisions, or the rules of public morality, why should they not be allowed to contract as they please? Our government is not so paternalistic as to prevent them. Unless their stipulations have a tendency to entangle national or state affairs, their contracts in advance to submit to the process of foreign tribunals partake of their strictly private business. Our courts are not interested except to the extent of preserving the right to prevent repudiation.

This same conclusion was reached and simply stated by Mr. Justice Karminski in the High Court of Justice Judgment which was entered in this case (App. 213):

> But I have approached the matter with, I hope, an unprejudiced mind - that is, unprejudiced by past history - and I have come to the clear conclusion here that the parties should, even after giving full consideration to the matters of convenience and the other matters concerned here, stick to their bargain.

---

[8] *See: Central Contracting Co. v. C. E. Youngdahl & Co.,* 209 A.2d 810 (Pa. 1965); *Krenger v. Pennsylvania R. Co.,* 174 F.2d 556 (2d Cir. 1949) (concurring opinion); *Mittenthal v. Mascagni,* 66 N.E. 425 (Mass. 1903).

Any contention that forum clauses are *per se* "invalid and against public policy" as a divestment of jurisdiction is archaic. Surely no meaningful distinction can be suggested between forum and arbitration clauses; historically, arbitration clauses were subject to the same specious reasoning on which the forum clause in this case was struck down; today, agreements to arbitrate are universally held valid and enforceable.[9]

---

[9] Ehrenzweig, Conflict of Laws, §§41,153 (1962); Restatement (Second) of Conflict of Laws, §80 (Proposed Off. Draft 1967); *Krenger v. Pennsylvania R.R. Co.*, 174 F.2d 556, 561 (2d Cir. 1949) (L.Hand, J., Concurring); Application of the Forum Clause to Commercial Contracts, 8 Houston L.Rev. 738 (1971); Collins, *Forum Selection and an Anglo-American Conflict — The Sad Case of the CHAPARRAL*, International and Comparative Law Quarterly (Vol. 20, p. 550, July 1971).

II

THE BURDEN OF PROVING A FORUM CLAUSE UNREASONABLE RESTS ON THE PARTY SEEKING TO AVOID ENFORCEMENT AND UNREASONABLENESS IS NOT DETERMINED BY APPLICATION OF FORUM NON-CONVENIENS.

The burden of proving a forum clause unreasonable rests on the party seeking to avoid enforcement and unreasonableness is not determined by exclusive application of the doctrine of *forum non-conveniens*. Not content with simply striking down the forum provision as invalid *per se*, the Court of Appeals, through exclusive application of *forum non-conveniens* determined that the clause in question was unreasonable, surprisingly citing *Central Contracting Co. v. Maryland Casualty Co.*, 367 F.2d 341 (3rd Cir. 1966) (App. 243-244 n.40), which case holds that forum clauses are *prima facie* valid and are not to be tested by application of *forum non-conveniens*. *Forum non-conveniens* is not the exclusive test of reasonableness; the burden of proof of reasonableness is not upon the party willing to perform. *Central Contracting* correctly applied the standard of reasonableness but unequivocably held that the burden of proof was on the party seeking to annul the contract. The application of the doctrine of *forum non-conveniens* "... the standard for which is that the plaintiff's [ZAPATA] choice of forum 'should rarely be disturbed' unless 'the balance is strongly in favor' of the defendant," (App. 278-279, Opinion, Wisdom, J., dissenting), *Gulf Oil Corporation v. Gilbert*, 330 U.S. 501 (1947), wrongly casts the burden on UNTERWESER rather than ZAPATA.

The proper legal approach is succinctly stated by Judge Wisdom:

> I submit that when a forum clause is involved our standard should be not to disturb the *contractual* choice of forum unless 'the forum chosen by the parties would be a seriously inconvenient one for the trial of the particular action.' Restatement (Second) Conflict of Laws, §80, Comment, *supra,* note 5. From this perspective I conclude that factors of convenience do not justify refusing the motion to decline jurisdiction. (Emphasis by Judge Wisdom). (App. 278-279).

Forum non-conveniens is a doctrine applied after the fact - when a dispute has developed and litigation is in progress. Therefore it cannot logically be applied to test the reasonableness of a forum contracted for in advance of a dispute in an effort by the parties to provide certainty in an international transaction. Reliance on the doctrine of *forum non-coveniens* simply ignores practical considerations in the minds of the parties when they selected the "initial forum". Here, for pragmatic commercial reasons, the initial choice was London and not Tampa and inclusion of the forum provision in the Towage Contract was an essential ingredient for the consideration bargained-for by UNTERWESER. (App. 22). These commercial realities were recognized in the dissent on Rehearing (App. 290-291):

> The decision of the majority is a backwards step by a forward-looking court. It has no place in a shrinking world where international commercial transaction are becoming increasingly commonplace. The safeguard against abuse of a forum clause is the local court's power to determine the reasonableness of enforcing the clause. But the burden of proving unreasonableness should fall on the party seeking

to escape from the obligation he contracted to undertake. ZAPATA has failed to show any good reasons for backing out of its bargain.

Absent guidelines, the approach of the lower courts to contractual forum clauses has been essentially the same as the approach to COGSA forum clauses. The decisions represent the application of unbridled discretion rather than discretion governed by realistic commercial and contract principles. As noted in Denning, *Choice of Forum Clauses in Bills of Lading,* Journal of Maritime Law and Commerce (Vol. 2, No. 1, p. 30-31, Oct. 1971) the difference between decisions has been solely one of attitude:

> At the same time, there were COGSA decisions which followed the spirit as well as the letter of Muller. [224 F.2d 806 (2d Cir. 1955)] Thus in Takemura & Co., Ltd., v. SS Tsuneshima Maru, [197 F.Supp. 909 (1961)] a case of a voyage from New York to Japan, a clause giving exclusive jurisdiction to the Japanese courts was enforced. In Pakhuismeesteren S.A. v. S.S. Goettingen, [225 F.Supp. 888 (1963)], the court enforced a clause giving exclusive jurisdiction to the courts of Hamburg, the voyage being from New York to Antwerp. In New York Underwriters Insurance Company v. M. S. Wurtemberg, [235 F.Supp. 909 (1964)] the court declined jurisdiction as a result of a clause providing for decision by German courts. These cases seem to treat choice of forum clauses as prima facie enforceable. They did not insist, as the court in Sociedade Brasiliera [135 F.Supp. 394 (1955)], insisted, on an absolute identity between the courts chosen and the governing law. They did not, as in Sociedade Brasiliera and Carbon Black [254 F.2d 297 (1958) at 301] regard the Muller [supra] doctrine of reasonableness as synonomous with the doctrine of forum non-conveniens. They did not give excessive weight to the nationality of the libellant.

[cf. Insurance Company of North America v. N.V. Stoomvaart, 201 F.Supp. 76 (1961)]. They seemed to ignore the limitations which had been placed on Muller. In the end, the difference was one of attitude. A hostile court could always find reasons for not following Muller. A court which accepted the liberal Muller approach could follow it, by ignoring the hostility shown by other courts. (footnotes omitted).

Naked concepts of "convenience," "national origin," or jurisdictional "power" have no place in determining reasonableness of forum clauses negotiated in international commerce.

The guidelines proposed in the dissent are essentially those utilized by the English courts.[10] The relevant standards, "... where parties have selected a forum without benefit of hindsight or fortuitous circumstances should be:

1. Did the parties freely and intelligently enter their agreement? * * *

2. Would the stipulated forum, in rendering its decision, transgress an important public policy of the present forum? * * *

3. Would the designated forum adjudicate the parties' dispute? * * *

4. Is the designated forum seriously inconvenient for the trial of the action? (App. 267-281).

Applying the first criterion, the record failed to show that ZAPATA had in any way been overreached. "... Perhaps more evidence could be accumulated, but

---

[10] See: *The ELEFTHERIA*, P. 94 (1970), 1 Lloyd's Rep. 237 (1969), 2 All. E.R. 641 (1969). The forum clause of the Towage Contract has been tested and found acceptable and enforceable under English guidelines. (App. 206 Opinion, High Court of Justice; App. 216, Opinion, English Court of Appeal).

under this evidence ZAPATA has not met the burden of showing that it was pressured into the forum stipulation." (App. 271, Opinion, Wisdom, J., dissenting). ZAPATA presented no evidence of fraud or overreaching and throughout the proceeding has suggested none; UNTERWESER offered the lowest bid of several submitted;[11] the Towage Contract was negotiated and not a contract of adhesion — ZAPATA itself made alterations which were accepted in Bremen.

The dissent, in applying the second criterion, correctly concludes that no important public policy of the United States is transgressed or at issue. The majority opinion, on the other hand, categorizes the following clauses of the Towage Contract as exculpatory and accordingly in violation of public policy enunciated in *Bisso v. Inland Waterways Corporation*, 349 U.S. 85 (1955), and *Dixilyn Drilling Corporation v. Crescent Towing and Salvage Co.*, 372 U.S. 697 (1963):[12]

> ... URAG (Unterweser), their Masters and Crews, are not responsible for defaults and/or errors in the navigation of the tow.
>
> * * *
>
> Damages suffered by the towed object are in any case for account of its Owners. (App. 26).

The dissent considered the argument of the majority and concluded that adjudication by the High Court of Justice provided ZAPATA with an adequate remedy and violated no important public policy. Judge Wisdom noted

---

[11] Unterweser $1900 a day; Wijsmuller $3100 a day; Moran $3400 a day. (App. 295-298).

[12] *Dixilyn* was determined on "authority" of *Bisso*. (App. 272, n.29, Opinion, Wisdom, J., dissenting).

that *Bisso* was intended to protect against inequality of bargaining and to discourage negligent conduct within the boundaries of the United States. Since the bargaining power was at least equal, and the casualty occurred in international waters, Judge Wisdom determined that rejection of the forum provision on grounds of public policy represented an unwarranted extension of *Bisso*. (App. 272-273). Indeed, had ZAPATA honored its contract and complied with its terms, the United States Courts would have had no opportunity to consider the public policy in question.

Refusal to enforce the forum provision on the basis of *Bisso* and *Dixilyn* necessarily presumes that the British Courts would: (1) apply the law of England; (2) find UNTERWESER guilty of negligence on the merits and (3) construe the clauses in question as exonerating the guilty party. Such a presumption at this juncture in the litigation is premature and speculative. In the first place, it is not certain that the British Courts would find that a choice of forum provision necessarily reflects a choice by the parties that the law of the forum shall apply to the contract as a whole. *Compagnie Tunisienne Navigation S.A. v. Compagnie d'Armement Maritime S. A.* [1970] 3 W.L.R. 389 (House of Lords). See also: Collins, *Arbitration Clauses and Forum Selecting Clauses in the Conflict of Laws: Some Recent Developments in England,* Journal of Maritime Law and Commerce (Vol. 2, No. 2, p. 363, Jan. 1971). Collins, *Forum Selection and an Anglo-American Conflict — The Sad Case of the CHAPARRAL,* International and Comparative Law Quarterly (Vol. 20, p. 550, 551, n. 2, July, 1971). Secondly, even assuming the application of English law, and following a trial on the merits, the High Court of Justice could very well determine that UNTERWESER was not negligent and hence not liable for

damages to the CHARARRAL. Finally, no Court, American or English, has had occasion to either construe or apply the so-called exculpatory provisions of the Towage Contract.

Judge Widsom's dissent had an additional and interesting observation on application of *Bisso, Dixilyn* and *Carbon Black* by the majority predicated purely on the fact of ZAPATA's American citizenship; he observed that insofar as public policy considerations were present,[13] they militated in favor of enforcement rather than against:

> A proper solicitation for the interest of American citizens may militate in favor of enforcing these clauses. Otherwise, Americans who wish to contract with foreign nations and who are willing to accept a forum clause will have difficulty in convincing the foreign party that he can rely on the agreement. (App. 275-276):

The third factor, whether the designated forum would adjudicate the parties' dispute, has clearly been answered in the affirmative by the Court of Appeal in London.

In considering the fourth factor, serious inconvenience, courts must carefully avoid allowing this criterion from becoming simply "another label for the doctrine of *forum non-conveniens,*" (App. 269, Opinion, Wisdom, J., dissenting).

---

[13] The public policy against limitation of liability clauses would not appear to be so entrenched as the Court of Appeals indicates since such clauses have been enforced in diversity cases where economic and practical realities justify them. *Seaboard Coastline R.R. v. Tennessee Corp.*, 421 F.2d 970 (5th Cir. 1970). See also: Zammit, *The Validity of the "Pilotage Clause" in Docking Assistance Contracts*, Journal of Maritime Law and Commerce (Vol. 3, No. 1, p. 71, Oct. 1971).

A determination as to whether the stipulated forum is seriously inconvenient must be made in light of the circumstances *existing at the time of contract*. The emphasis must be upon circumstances existing before the fact of casualty or dispute; otherwise, forum clauses constituting bargained-for consideration could be overlooked and submerged by inapposite considerations of "number" and "location" of witnesses and documents. The contractual forum should not be disturbed on the basis of citizenship or fortuitous circumstances; it should be disturbed only in cases of serious inconvenience to the parties, and such inconvenience is not present in this case:

> It is true that depositions of the German crew members are available because Zapata obtained them immediately after filing its libel. But if, as is likely, Zapata's witnesses are its crewmen (on the Chaparral) and Unterweser's witnesses are its crewmen (on the Bremen), the inference from the observation is that Zapata should have live witnesses at trial while Unterweser relies on depositions. Presumably depositions of the American witnesses could be taken for an English trial, or both sides face the same difficulty of transporting their witnesses. Although the voyage began here and the casualty occurred nearby, the tug was built in Germany and had its home port in Bremen. As the High Court of Justice observed, 'There is probably a balance of numbers in favor of the Americans, but not, as I am inclined to think, a very heavy balance.' The fact that no contacts exist with the English forum is not determinative. That forum was chosen as a logical compromise should a dispute arise. The English court has the advantage of dividing the inconveniences between the disputants. (App. 279, Opinion, Wisdom, J., dissenting). (Footnotes omitted).

Furthermore, with respect to serious inconvenience, there is no showing that either party would gain procedural advantage by virtue of adjudication by the London courts. If any party has been prejudiced in this case, it has been UNTERWESER. In the length of time it took the District Court to determine and rule upon UNTERWESER'S original motion for stay (filed January 29, 1968), the English trial court accepted jurisdiction of the cause, dealt with and determined the legal issues pending before this Court, and was affirmed by the English Court of Appeal. (App. 206, 215). Moreover, the delay occasioned by the proceedings in Tampa forced UNTERWESER to protect its limitation rights, which fact was seized upon by the majority to support its decision:[14]

> The contention that Unterweser should be treated as having assented to the jurisdiction of the local court by filing the limitation action is a red herring. In the first place, Unterweser (more accurately, the tug Bremen) left international waters to enter the district court's jurisdiction *upon the instructions of Zapata*. Conveniently, Zapata had a United States marshal waiting to arrest the Bremen when the tug entered Tampa Bay with the disabled Chaparral (the drilling rig). And when Unterweser proceeded to move the district court to dismiss the suit, the district court failed to rule on its motion *until after the statutory period for filing a limitation action had elapsed*. Unterweser had already sued in London for breach of contract. Prior to the limitation action, the High Court of Justice had ruled that Zapata had been properly served and that the action should proceed in the English courts. (Footnote deleted) (App. 287, Opinion, Wisdom, J., dissenting). (Emphasis by Judge Wisdom).

[14] See: Note, 39 Cinn. L.Rev. 819 (1970), which correctly characterizes the Court of Appeals' decision in this regard as a preversion of the purpose of a limitation proceeding.

Nor does satisfaction of judgment pose any problem, Unterweser having offered to make available the security posted in Tampa to satisfy any judgment obtained by Zapata in London.

The finding of the District Court, affirmed by the Court of Appeals, that:

> Defendant has not suggested and there is no showing that American courts are not capable of adjudicating this case fairly and justly. The balance of convenience here is not strongly in favor of defendant and plaintiff's choice of forum should not be disturbed. (App. 82).

(1) misplaces the burden of proof; (2) fails to apply the appropriate tests; (3) ignores the *initial choice of forum* which was contracted for and represented bargained-for consideration.

III

THE DECISION BELOW REJECTS PRINCIPLES OF UNIFORMITY AND COMITY IN INTERNATIONAL LAW AND FOSTERS DISTRUST OF AMERICAN COURTS AND CONTRACTUAL COMMITMENTS INVOLVING AMERICAN CITIZENS.

Uniformity of international law is a desirable objective insofar as it does not require a United States Court to relinquish its sovereignty. *Standard Oil Company v. United States,* 340 U.S. 54 (1950); *Aetna Insurance Company v. United Fruit Company,* 304 U.S. 430 (1938). Federal courts do recognize the competency and validity of foreign tribunals and extend to them the comity which they are due:

> ... We observe that fundamental principles have been lost sight of. *The issue is not one of jurisdiction, but one, almost as important when a foreign sovereign is involved, of comity.* The presence of the parties confers on the district court jurisdiction to act, Cole v. Cunningham, 1890, 133 U.S. 107, 121, 10 S. Ct. 269, 33 L.Ed. 538, but the direct effect of the district court's action on the jurisdiction of a foreign sovereign requires that such action be taken only with care and great restraint. See Donovan v. City of Dallas, 12 L.Ed. 2d 409. We have only recently pointed out the comity which the federal courts owe to courts of other jurisdictions. Hayes Indus., Inc. v. Caribbean Sales Associates, Inc., 1 Cir. 1968, 387 F. 2d 498. See Also Toucey v. New York Life Ins. Co. 1941, 314 U.S. 118, 62 S. Ct. 139, 86 L.Ed. 100. The Congressional policy upon which 28 U.S.C. §2283 is based should, a fortiori, be reflected by a self-imposed reluctance to interfere with courts of foreign countries. *Canadian Filters (Harwich) Ltd. v. Lear-Siegler, Inc.,* 412 F.2d 577, 578 1st Cir. 1969) (emphasis added)

Recognition of comity by the lower courts in this case would have given effect to the contractual expectations of the parties, would not have subjected either party to unanticipated hardship or inconvenience and would not have done violence to the jurisdiction or integrity of a United States court.

While the decision below is erroneous from a legal standpoint, its most far reaching effect is in the area of conflict of laws in international trade. The profound adverse effect of the Fifth Circuit's opinion in *this case* on commercial relations and private international law has been assessed by one commentator as follows:

> A recent series of litigation in England and the United States has taken a course which must give rise to serious misgivings among private international lawyers — for in this litigation the federal courts of the United States have arrogated to themselves jurisdiction and indicated they would apply American law in a case where two parties, at arms-length and with equal bargaining power, chose English jurisdiction and avoided a choice of American law.
>
> * * *
>
> A mere recitation of these essential facts must cause disquiet. The federal court exhibited a very real and profound lack of understanding of international commercial transactions. It did not appear to have any knowledge of the fact that the business men who enter into contracts of this kind know their law and they know their courts. If a particular law or a particular forum is chosen certain consequences follow. In this case, the English courts were chosen as a reasonable compromise. The German company must be taken to have known that the exculpatory clauses would be given effect in England and must have made insurance arrangements accordingly.

> Similarly it can hardly be doubted that the American company made insurance arrangements on the basis of the efficacy of the contract.
>
> * * *
>
> The American federal court entirely failed to appreciate that choice of jurisdiction in an international commercial transaction is not a minor clause relating to machinery but very often a vital factor in negotiations. Every practitioner must know of cases where contracts would never have been entered into but for the choice of some particular law or jurisdiction. If such choices are to be so freely disregarded the whole point of having a rational system of private international law will have disappeared.[15]

More distressing is the relentless emphasis placed by the Fifth Circuit upon the American citizenship of ZAPATA coupled with the surprising suggestion that an American citizen might not receive a fair hearing in an English court. Such provincialism is completely unacceptable on an international level: English courts have through centuries enjoyed the reputation of efficient and impartial administration of justice, especially in commercial and admiralty matters, a reputation which remains untarnished. Further, any suggestion that the English courts could not fairly administer a maritime case is unthinkable, for:

> . . . it is not uncommon in the shipping world to find foreign shipowners in their contracts agreeing that any dispute between them shall be decided by the

---

[15] Collins, *Forum Selection and An Anglo-American Conflict — The Sad Case of the CHAPARRAL*, International and Comparative Law Quarterly (Vol. 20, p. 550, July 1971), at pages 550, 556, 557.

English commercial court according to English law. *Tzortzis v. Monark Line A/B* (1968) 1 All. E. R. 949, 952.

Surely, under circumstances of this case, United States public policy dictates that its courts give effect to the principle of comity by exercising restrained judicial discretion encouraging implementation of the contractual expectations of parties to an extra-national contract. Only through recognition of such principles will United States Courts be able "... to keep the law at a grade at least as high as the standards of ordinary ethics." *Gilbert v. Burnstine,* 174 N.E. 706, 707 (N.Y. 1931).

CONCLUSION

Accordingly, it is respectfully submitted that this Court should reverse the United States Court of Appeals for the Fifth Circuit, and remand the case with instructions to stay the Tampa action and relegate the parties to the London forum for which they contracted.

Respectfully submitted,

DAVID C. G. KERR
of MACFARLANE, FERGUSON,
ALLISON & KELLY
Post Office Box 1531
Tampa, Florida 33601
Counsel for Petitioner

JACK C. RINARD
of MACFARLANE, FERGUSON,
ALLISON & KELLY
Post Office Box 1531
Tampa, Florida 33601
Of Counsel for Petitioner

WARREN M. FARIS and
J. Y. GILMORE, JR.
of FARIS, ELLIS, CUTRONE,
GILMORE & LAUTENSCHLAEGER
1207 Whitney Building
New Orleans, Louisiana 70130
Of Counsel for Petitioner

LIBRARY
SUPREME COURT, U. S.

FILED
JAN 21 1972
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

No. 71-322

IN THE MATTER OF THE COMPLAINT OF
UNTERWESER REEDEREI, GMBH,
FOR EXONERATION FROM OR LIMITATION
OF LIABILITY AS OWNER OF THE M/S BREMEN
UNTERWESER REEDEREI, GMBH,

Petitioner,

v.

ZAPATA OFF-SHORE COMPANY

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

JAMES K. NANCE of
BAKER & BOTTS
3000 One Shell Plaza
Houston, Texas 77002
and
DEWEY R. VILLAREAL, JR., of
FOWLER, WHITE, GILLEN,
HUMKEY, KINNEY & BOGGS, P.A.
P. O. Box 1438
Tampa, Florida 33601
Attorneys for Respondent,
ZAPATA OFF-SHORE COMPANY

FIDELITY PRINTING COMPANY, INC., HOUSTON

TABLE OF CONTENTS

	PAGE
OPINION BELOW	1
JURISDICTION	1
QUESTION PRESENTED	2
STATEMENT	3
SUMMARY OF ARGUMENT	9
ARGUMENT	11
I Unterweser's Motion to Stay Was Properly Denied Because Unterweser Had Submitted Itself and the Entire Dispute to the District Court's Jurisdiction by Filing the Limitation Suit, Procuring the Issuance of a Limitation Injunction, and Counterclaiming Against Zapata	11
II The Forum Clause, Which Unterweser Drafted, (1) Is Non-Exclusive; (2) Is Not Addressed to an Action in Rem; and (3) Does Not Purport, and Should Not Be Construed, to Apply to Zapata's Claim in a Limitation Action Unterweser Commenced	21
III Unterweser's Motion to Stay Was Properly Denied Because It Would be Unreasonable to Enforce the Forum Clause Under the Facts of This Case	26
Factors to be considered	27
Effect of enforcement on Zapata's substantive rights	28
Balance of convenience	33
Summary regarding reasonableness	40
IV Unterweser's Attack on the Decisions Below Urges a Focus on Circumstances at the Time of Negotiation of the Contract, Which No Court Has So Far Approved. This Argument Disregards the Fact That the District Court Looked to the Factors Considered by Courts Which Have Followed the "Modern Rule" and Considered Them at the Time of the Litigation in Keeping with the Universal Practice	41
CONCLUSION	48
CERTIFICATE OF SERVICE	49

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES CITED

Cases

PAGE

A. C. Dodge, Inc. v. J. M. Carras, Inc., 218 F.2d 911 (2d Cir. 1955) 18

Bisso v Inland Waterways Corp., 349 U.S. 85 (1955) 29

Bisso v. Waterways Trans. Co., 235 F.2d 741 (5th Cir. 1956) 25

British Transport Commission v. United States, 354 U.S. 129 (1957) 15, 16

Central Contracting Co. v. Maryland Casualty Co., 367 F.2d 341 (3rd Cir. 1966) 27, 31

Central Contracting Co. v. C. E. Youngdahl & Co., 209 A. 2d 810 (Sup. Ct. Pa. 1965) 26

Cerro De Pasco Copper Corp. v. Knut Knutsen, O.A.S., 187 F.2d 990 (2d Cir. 1951) 28

Charter Shipping Co., Ltd. v. Bowring, Jones & Tidy, Ltd., 281 U.S. 515 (1930) 11, 44

Chemical Carriers, Inc. v. L. Smit & Co.'s International Sleepdienst, 154 F. Supp. 886 (S.D.N.Y. 1957) 21, 27, 31

Coast Lines, Ltd. v. Hudig & Veder N.V., 2 Lloyds Rep. 390 (1971) 29

Coryell v. Phipps, 317 U.S. 406 (1943) 19

Coryell v. Pilkington, 39 F. Supp. 142 (S.D. Fla. 1941) 19

Deep Sea Tankers v. The Long Branch, 258 F. 2d 757 (2d Cir. 1958) 19

Dixilyn Drilling Corp. v. Crescent Towing & Salvage Co., 372 U.S. 697 (1963) 10, 29

Engel v. Shubert Theatrical Co., 151 N.Y.S. 593 (Sup. Ct. App. Div. 1915) 22

General Motors Overseas Operations v. S.S. Goettingen, 225 F. Supp. 902 (S.D.N.Y. 1964) 27, 31

Hartford Accident & Indemnity Co. v. Southern Pac. Co., 273 U.S. 207 (1927) 14, 15

Hawaii Credit Card Corp. v. Continental Credit Card Corp., 290 F. Supp. 848 (D.C. Hawaii 1968) 27

Indussa Corp. v. S.S. Ranborg, 377 F.2d 200 (2d Cir. 1967) 22

Motor Distributors Ltd. v. Olaf Pedersen's Rederei A/S, 239 F.2d 463 (5th Cir. 1957) 25

PAGE

Murillo Ltda. v. The Bio Bio, 127 F.Supp. 13 (S.D.N.Y. 1955), aff'd per curiam, 227 F.2d 519 (2d Cir. 1955) 27, 28

Murray v. New York Central Railroad Co., 287 F.2d 152 (2d Cir. 1961) 19

National Equipment Rental, Ltd. v. Szukhent, 375 U.S. 311 (1964) 46

Oceanic Steam Nav. Co. v. Corcoran, 9 F.2d 724 (2d Cir. 1925) 30, 47

Offshore Company v. G. & H. Offshore Towing Co., 262 F. Supp. 282 (S.D. Tex. 1966) 29

Providence & N.Y. S.S. Co. v. Hill Mfg. Co., 109 U.S. 578 (1883) 14

South, Inc. v. Moran Towing and Trans. Co., Inc., 360 F.2d 1002 (2d Cir. 1966) 25

Spencer Kellog Co. v. Hicks, 285 U.S. 502 (1932) 15

States Marine Lines, Inc. v. The M/V Koker Maru 180 F. Supp. 255 (N.D. Cal. 1960) 28

Stevens v. The White City, 285 U.S. 195 (1932) 25

Swift & Co. Packers v. Compania Colombiana Del Caribe, S.A., 339 U.S. 684 (1950) 28

Takemura & Co. v. The S.S. Tsuneshima Maru, 197 F. Supp. 909 (S.D.N.Y. 1961) 21, 27

The Belgenland, 114 U.S. 355 (1885) 29

The Chickie, 141 F.2d 80 (3rd Cir. 1944) 19

The Gylfe v. The Trujillo, 209 F.2d 386 (2d Cir. 1954) 29

The Kensington, 183 U.S. 263 (1902) 30, 47

The Monrosa v. Carbon Black Export, Inc., 359 U.S. 180 (1959) 22, 24

The Salvore, 36 F. 2d 712 (2d Cir. 1929) 16, 17

The Scotland, 105 U.S. 24 (1881) 29

The Titanic, 233 U.S. 718 (1914) 10, 30

The Western Farmer, 210 F. 2d 754 (2d Cir. 1954) 30

Wm. H. Muller & Co., Inc. v. Swedish American Line Ltd., 224 F. 2d 806 (2d Cir. 1955) 27, 28, 31

Volkswagen of America, Inc. v. S.S. Silver Isle, 257 F. Supp. 562 (N.D. Ohio 1966) 28

Statutes and Rules

	Page
Constitution of the United States, Art. III, Section 2	12
28 USC § 1333	12
46 USC § 181 et seq.	12
46 USC § 183	13, 19
46 USC § 185	18
Supplemental Rule F, Federal Rules of Civil Procedure	18

Texts

56 ALR2d 300 (1957), Anno.	26
Benedict on Admiralty, 6th Ed., Vol. 1, §§ 11 and 12, pp. 17-24	23
5A C.J.S. Appeal and Error § 1583, p. 24 (1958 Ed.)	44
17 C.J.S. Contracts § 229(1), p. 1069 (1963 Ed.)	26
17A C.J.S. Contracts § 324, p. 217 (1963 Ed.)	23
Gilmore and Black, *The Law of Admiralty* (1957)	
§ 1-12, p. 30 et seq	23
§ 1-12, p. 31	10
§ 10-7, p. 668	12
Model Choice of Forum Act, National Conference of Commissioners on Uniform State Laws (1968), 17 Am.J. Comp. L. 294-295 (1969)	32, 37
Reese, The Contractual Forum: Situation in the United States, 13 Am. J. Comp. L. 187, 189 (1964)	32, 37

IN THE

Supreme Court of the United States

No. 71-322

IN THE MATTER OF THE COMPLAINT OF
UNTERWESER REEDEREI, GMBH,
FOR EXONERATION FROM OR LIMITATION
OF LIABILITY AS OWNER OF THE M/S BREMEN
UNTERWESER REEDEREI, GMBH,

Petitioner,

v.

ZAPATA OFF-SHORE COMPANY

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINION BELOW

The panel opinion of the Court of Appeals (A. 229) is reported at 428 F.2d 888. On rehearing en banc, the Court adopted, per curiam, the majority holding and judgment of the panel. (A. 283; 446 F.2d 907). The order of the District Court (A. 224) is reported at 296 F. Supp. 733 (M.D. Fla. 1969).

JURISDICTION

The jurisdiction of the District Court was predicated upon the Constitution of the United States, Article III,

Section 2, and Title 28 U.S.C. § 1333, c. 646, 62 Stat. 931 (amended), and 46 U.S.C. § 181, et seq. c. 43, 9 Stat. 635 (amended). The jurisdiction of the Supreme Court to review the decision of the Court of Appeals is conferred by 28 U.S.C. § 1254(1), c. 646, 62 Stat. 928. The judgment of the Court of Appeals on Rehearing En Banc was entered on June 28, 1971. The Petition for Writ of Certiorari, filed September 1, 1971, was granted November 9, 1971.

Question Presented

Zapata commenced suit against Unterweser in Tampa. Unterweser disputed jurisdiction, and asked the court to decline on *forum non conveniens* grounds or stay pending submission to the English court. Unterweser then commenced suit against Zapata in London. Next Unterweser filed a suit for exoneration from or limitation of liability in Tampa and obtained in that suit an injunction staying Zapata's first filed suit. Zapata filed claim and answer in the limitation suit. Unterweser counterclaimed. Zapata replied to the counterclaim. At this point Zapata moved the limitation court to enjoin Unterweser's prosecution of the London suit and Unterweser moved the limitation court to stay the prosecution of Zapata's claim in the limitation suit. The question is:

> WHETHER, IN THE CIRCUMSTANCES OF THIS PARTICULAR CASE, THE DISTRICT COURT ABUSED ITS JUDICIAL DISCRETION IN RULING THAT ALL OF THE CONTROVERSIES AT ISSUE BETWEEN UNTERWESER AND ZAPATA SHOULD BE TRIED IN UNTERWESER'S OWN TAMPA SUIT FOR EXONERATION FROM OR LIMITATION OF LIABILITY.

STATEMENT

Zapata, a Houston based American corporation, engaged Unterweser, a Bremen based German corporation, to tow its American flag drill rig CHAPARRAL from the Mississippi River below New Orleans to a point in the Adriatic Sea near Ravenna, Italy. The towage contract included a London forum clause.

It is Zapata's contention that its representatives instructed those in charge of the BREMEN to tow the CHAPARRAL around the coast from the Mississippi Passes to the Straits of Florida, in water no deeper than 250 feet, so that, in the event of untoward weather, the CHAPARRAL might lower its legs to the seabed, to elevate (or jack up) the body of the rig and await suitable conditions to resume the tow.[1] There is a conflict in the evidence as to whether or not Unterweser's representatives were so instructed to proceed by Zapata's representatives.

Special locking devices on board the drill rig were to be installed to immobilize the three 435 foot long legs before the trans-Atlantic crossing was begun.[2] As it happened, the BREMEN, with the CHAPARRAL in tow, set out on a

---

[1] Zapata has alleged in its answer to Unterweser's limitation action that the casualty to the CHAPARRAL was caused by the negligence of Unterweser and those in charge of the BREMEN in several respects, including the following:

> "(6) Those in charge of the BREMEN failed to tow the CHAPARRAL in depths of water in which the CHAPARRAL's legs might be lowered to the ocean bottom and the CHAPARRAL might be elevated out of the water in the event of adverse weather, despite instructions from Zapata to proceed in such depths of water.
>
> (7) Those in charge of the M/S BREMEN failed to tow the CHAPARRAL in coastwise waters on the voyage from Louisiana toward the Florida Straits, despite instructions from Zapata so to proceed." (A. 108, 109).

[2] See photograph of locking devices in attached Appendix, A-2.

direct course across the Gulf of Mexico from the Mississippi to the Florida Straits instead of proceeding coastwise in jack-up water depths. When weather worsened in a norther the flotilla was in the middle of the Gulf of Mexico in about 10,000 feet of water, about 150 miles from the nearest 250 foot depth. There was no possibility of lowering the legs to the seabed and elevating the body of the rig in order to ride out the severe weather. As the sea grew rougher and the CHAPPARRAL rolled, the stress on the legs passed the breaking point. Then, as Unterwesser puts it, "the legs of the CHAPARRAL collapsed and fell into the sea." A falling leg broke the tow hawser. The riding crew left the CHAPARRAL and was picked up by the BREMEN. Later the BREMEN put a tow hawser on the CHAPARRAL and Zapata told Unterweser to tow the wrecked rig to Tampa, Florida, the nearest port of refuge.[3]

On January 12, 1968, Zapata commenced suit against Unterweser *in personam* and the tug BREMEN *in rem* alleging *negligent* towage on the part of those in charge of the BREMEN, seeking to recover $3,500,000 in damages. (A. 7).

When the flotilla arrived at Tampa, the U. S. Marshal arrested Unterweser's tug, the BREMEN, in Zapata's suit. (A.148). Zapata deposed Unterweser's managing director and the entire 23 man crew of the BREMEN (including Unterweser's riding crew on the CHAPARRAL) in Tampa on January 23-31, 1968. (A. 149).[4]

---

[3] See photograph of damaged CHAPARRAL following the casualty, Appendix, A-3.

For photograph of CHAPARRAL in drilling position, with legs lowered (prior to casualty), see Appendix, A-4.

[4] In connection with these depositions the navigational charts, log books, incoming and outgoing radio messages of the BREMEN, and certificate by competent surveyor (required by paragraph 4 of towage contract), were produced.

On January 29, 1968 Unterweser, asserting the forum clause, moved for dismissal of Zapata's suit, contending the district court lacked jurisdiction. Alternatively, Unterweser moved the court (1) to decline jurisdiction on *forum non conveniens* grounds, or (2) to stay the Tampa suit, pending submission of the matter to the English courts. (A. 19).[5]

Meanwhile Unterweser commenced suit for *breach of contract* against Zapata in London on February 21, 1968 (A. 134), seeking to recover tug hire, damages to towing gear, and lost profits. *No claim for salvage was asserted.* (A. 138).

Unterweser, *after notice filed in Zapata's suit* (A. 34), deposed the CHAPARRAL's 8 man crew in Tampa on February 22-25, 1968. (A. 53,54).[6]

Further *invoking* the Tampa court's aid in the first suit, Unterweser moved for the production of 33 categories of documents on February 27, 1968. (A. 37). Zapata responded by producing 700 pages of documents for Unterweser's inspection. (A.151).

Again invoking the court's aid, on March 15, 1968 Unterweser noticed the depositions of 2 expert surveyors who had approved the CHAPARRAL for the tow to the Florida Straits. (A. 43). These depositions were taken in New Orleans April 9-12, 1968. (A. 151).[7]

---

[5] The court in its Memorandum and Order of July 29, 1968 denied these motions. (A. 80). No appeal was taken by Unterweser.

[6] In the course of the depositions, the maintenance and operation manuals of the CHAPARRAL, the operating and maintenance records prepared and kept in connection with the CHAPARRAL, and the records covering the CHAPARRAL's movements prior to the voyage in question, were all produced and copied.

[7] Noel Thompson and John Hellendoorn, Salvage Association (London) marine surveyors, residents of Louisiana and New

On July 2, 1968 Unterweser filed a complaint in the U. S. District Court at Tampa seeking exoneration from or limitation of liability for events on the voyage upon which the CHAPARRAL was damaged. (A. 85).

On July 5, 1968 the district court, on Unterweser's motion, enjoined the further prosecution of Zapata's first filed suit. (A. 97).

On July 8, 1968 Zapata filed its claim in Unterweser's limitation suit. (A. 102). On July 24, 1968 Zapata filed its answer. (A. 104).

On August 28, 1968, in the limitation suit, Unterweser filed a counterclaim against Zapata for everything sought in the London breach of contract suit (A. 112), and in addition Unterweser alleged (1) in Count I a maritime tort (negligence) against Zapata for damage to the BREMEN's towing gear (A. 113), and (2) in Count II a claim for a salvage award for services rendered by the BREMEN following the casualty. (A. 115). Unterweser alleged its salvage services were *not* contemplated by the towage contract and consisted of services *outside* the contract. (A. 116). Unterweser's stated damages totalled $91,483.08, plus an unspecified amount for (1) lost profits and (2) salvage services. (A. 114-116).

On September 13, 1968 Zapata replied to Unterweser's counterclaim. (A. 116). All issues between the parties were then joined in Tampa.

On September 19, 1968 Zapata moved for an order en-

Jersey, respectively. Their survey notes and reports were produced and copied as was certain correspondence between the New Orleans and New York offices of Salvage Association, London, in connection with the CHAPARRAL casualty. (A. 151). These witnesses testified as to the voyage and routing plans of the tug and tow in conferences held with Zapata and Unterweser representatives. (A. 145).

joining Unterweser from prosecuting its London suit. (A. 118).

On October 2, 1968 Unterweser moved for an order staying the further prosecution of Zapata's claim in the limitation suit pending final determination of the London suit. (A. 205).

On January 21, 1969 the district court denied Unterweser's motion to stay and granted Zapata's motion for injunction against Unterweser's prosecution of the London suit. (A. 224). *This is the order from which Unterweser appealed.*

In the London suit (1) Zapata has not joined issue, (2) Zapata has asserted no counterclaim, (3) neither party has taken any testimony, and (4) there has been no pretrial discovery. Action in the London suit has been suspended by agreement between the parties pending the outcome of the appeal.

Zapata Off-Shore Company was self-insured with respect to all of the risks on the CHAPARRAL. (A. 321). There was neither hull and machinery insurance, protection and indemnity insurance, nor liability insurance on the CHAPARRAL. (A. 321).

Zapata has paid, with its own funds, approximately $3,000,000 for repairs to the CHAPARRAL and other expenses resulting from the casualty. Zapata has no claim pending against anyone, other than Unterweser and the BREMEN, to recover these damages. (A. 321). In addition to the moneys actually paid for repairs and related expenses, Zapata claims damages of approximately $500,000 for the loss of use of the CHAPARRAL while it was being repaired.

Zapata alone will bear the expenses of defending the claim asserted against it by Unterweser Reederei Gmbh and will

respond to any judgment rendered against it arising out of this litigation. (A. 321).

The BREMEN is enrolled with the United Kingdom Mutual Steamship Assurance Association, Limited, a Protecting and Indemnity Club. The Club is bearing the expenses of the litigation and will respond to any judgments against the BREMEN and Unterweser arising out of this litigation.[8]

The towage contract was signed by Zapata in Houston, Texas. The following duties arising under the contract were performed in the United States:

By Zapata

Preparing the CHAPARRAL for the voyage so as to have her in a "seaworthy" condition for the proposed towage. (A. 25, Par. 4). This work was done in the Mississippi River near Venice, Louisiana. (A. 154).

Engaging Salvage Association, London (a world-recognized marine surveying organization) to examine the CHAPARRAL and certify her seaworthiness for the voyage prior to departure. (A. 25, Par. 4). The Salvage Association's Messrs. Thompson (a Louisiana resident) and Hellendoorn (a New Jersey resident) conducted the examination while the CHAPARRAL was in the Mississippi near Venice. (A. 154). On January 5, 1968, Hellendoorn certified the CHAPARRAL for the voyage (limited to the Florida Straits). (A. 154).

Paying tow hire to the Chase Manhattan Bank in New York City, in favor of Unterweser. (A. 24, Par. 1).

Paying the charges of the Mississippi River pilots for piloting the BREMEN and the CHAPARRAL from Venice, Louisiana, to the Gulf of Mexico. (A. 24, Par. 2; A. 154).

---

[8] Unterweser's Supplemental Brief on Rehearing En Banc in Court of Appeals, p. 4.

By Unterweser

Sending Port Captain/Marine Superintendent Otto Litwinski to the CHAPPARAL in December, 1967 to inspect the CHAPARRAL and, with Zapata's representatives, to plan the voyage. (A. 153).

Sending the master and certain other officers and crew of the BREMEN on board the CHAPARRAL for inspection and making towing arrangements and connections. (A. 154).

By towing the CHAPARRAL from Venice, Louisiana, to the point in the Gulf of Mexico at which the flotilla passed out of the territorial waters of the United States. (A. 154).

SUMMARY OF ARGUMENT

Having submitted itself and the entire dispute to the Tampa court by filing suit for limitation of liability, having Zapata's first filed suit stayed by the limitation injunction and counterclaiming against Zapata, Unterweser should not be heard to complain that the court refused to stay the limitation suit. Unterweser might have plead the limitation statutes as a defense had it not wanted the *concourse* and the *ex parte* stay of all other proceedings. To allow simultaneous litigation of the dispute would increase costs, lead to vexation and delay, and defeat the limitation law's objective of settling the whole controversy. *Hartford Accident & Indemnity Co.* v. *Southern Pac. Company,* 273 U.S. 207 (1927).

The non-exclusive forum clause in the towage contract does not purport to reach claims *in rem. The Monrosa* v. *Carbon Black Export, Inc.* 359 U.S. 180 (1959). It surely cannot be held to preclude Zapata from filing and prosecuting its claim in the limitation action Unterweser started in the Tampa court. And it is not cast in the traditional lan-

guage used to designate one forum to the *exclusion* of all others. Unterweser drafted the forum clause and must bear the brunt of any obscurity.

Enforcement of the forum clause would have been unreasonable, because it would effectively deprive Zapata of a remedy it has in the American court for damages caused by Unterweser's negligence.[8a] In the London court the exculpatory clauses, void as against United States public policy here, would be enforced.

Enforcement would also be unreasonable because it would send Zapata to a forum in which, if Unterweser be allowed to limit its liability, the limitation fund would be $80,136 as opposed to the United States fund of $1,390,000.[8b]

Enforcement would be unreasonable because the balance of convenience is strongly in favor of the Tampa court. The voyage preparations, the voyage, and the aftermath all occurred in the United States or nearby in the Gulf of Mexico. Forty witnesses live on the Gulf Coast or the lower Mississippi. The foreign crew members' testimony has been preserved by deposition.[8c] In all, 35 oral depositions have been taken in the Tampa litigation. Issue is not yet joined in London.

Whether considering the convenience of the forum or the unreasonableness of enforcement of a forum clause, the courts have looked to the same factors. The focus on these factors is at the time of the litigation, *not at the time of contract.*

Where the district court considered the burden of proof lay might be of critical importance, if the factors of convenience/unreasonableness were evenly divided. But here

---

[8a] *Dixilyn Drilling Corp.* v. *Crescent Towing & Salvage Co.*, 372 U.S. 697 (1963).

[8b] *The Titanic*, 233 U.S. 718 (1914).

[8c] "Depositions are frequently taken and used, for witnesses are likely to be long gone before a suit can be reached on the docket." Gilmore & Black, *The Law of Admiralty*, § 1-12, p. 31.

the District Court found the factors preponderated strongly in favor of Tampa. Any presumption of validity of the forum clause, or burden of proof of unreasonableness, becomes unimportant when the evidence points to one result — the balance of convenience *strongly* favors the Tampa court.

The District Court properly exercised its discretion in determining that the entire controversy should be tried in Unterweser's limitation action. The Court of Appeals found there was no abuse of that discretion. And that discretion may not be disturbed unless abused. *Charter Shipping Co., Ltd.*, v. *Bowring, Jones & Tidy, Ltd.*, 281 U. S. 515 (1930).

ARGUMENT

I

Unterweser's Motion to Stay Was Properly Denied Because Unterweser Had Submitted Itself and the Entire Dispute to the District Court's Jurisdiction by Filing the Limitation Suit, Procuring the Issuance of a Limitation Injunction, and Counterclaiming Against Zapata.

Unterweser is seeking to overturn affirmance of a discretionary order entered by the district court in a limitation suit Unterweser started.

Unterweser's fundamental inconsistency in filing for limitation and having further prosecution of Zapata's first filed suit enjoined, by the limitation injunction on the one hand, and seeking then to have the limitation suit stayed on the other, should not be countenanced under the circumstances of this case.

The district court jurisdiction Unterweser invoked was predicated upon the Constitution of the United States,

Article III, Section 2;[9] Title 28 U.S.C. § 1333, c. 646, 62 Stat. 931 (amended);[10] and [the limitation of liability statute] 46 U.S.C. § 181, et seq., c. 93, 9 Stat. 635 (amended). (Petition for Certiorari, p. 5)

In its complaint for limitation Unterweser alleged that it ". . . desires to contest its liability and the liability of M/S BREMEN for the injuries, losses and damages . . . incurred upon said voyage, *and particularly any losses and damages incurred by the owners [Zapata] of the drill rig CHAPARRAL. . . .*" (A.89). (emphasis added)

Unterweser further asserted in its ad interim stipulation that ". . . the Plaintiff [Unterweser] wishes to prevent the prosecution of all proceedings against Plaintiff, or M/S BREMEN . . . in any and all courts . . . arising out of the matters . . . recited in said Complaint . . . *except in the present proceedings* . . ." (A. 95). (emphasis added)

Unterweser invoked the jurisdiction of the district court at Tampa to seek the *privilege* of limiting its liability to all who might assert claims arising on the voyage which ended at Tampa.[11] If Unterweser is allowed to limit its liability

---

[9] Article III, Section 2 of the United States Constitution provides:

"Jurisdiction of Courts.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . to all Cases of admiralty and maritime Jurisdiction; . . ."

[10] 28 U.S.C. § 1333 provides:

"Admiralty, maritime and prize cases.

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled. . . ."

[11] Gilmore and Black, *The Law of Admiralty*, § 10-7 p. 668, comments on Section 183(a) of Title 46 U.S.C. as follows:

in this case, the *privilege* will be worth $2,110,000, if there are no other claims and if interest on Zapata's claim is disregarded.[12]

Besides the privilege of seeking limitation of liability to the value of the BREMEN, Unterweser sought and obtained the *privilege* of drawing all claims arising on the voyage which ended at Tampa into *concourse* in the Tampa court. In its sworn complaint for limitation of liability Unterweser said:

> "Plaintiff [Unterweser] asserts that demands made in such action [referring to Zapata's first-filed suit] greatly exceed the value of M/S BREMEN and its pending freight, if any, or the interest of Plaintiff therein; *further, plaintiff fears the filing of additional claims.*" (A. 88). (emphasis added)

There were a number of potential claimants. The events surrounding the loss of the CHAPARRAL's legs were har-

---

"Section 183(a) thus states, in terms of the utmost generality, the types of claims against which the *privilege* of limitation is conferred, conditions the *privilege* on the absence of 'privity and knowledge' on the part of the owner, and sets, as the maximum liability of an owner entitled to limit, his interest in the vessel and her pending freight. . . ." (emphasis added)

46 U.S.C. § 183(a), R.S. § 4283; Aug. 29, 1935, c. 804, § 1, 49 Stat. 960; June 5, 1936, c. 521, § 1, 49 Stat. 1479, provides:

"The liability of the owner of any vessel, whether American or foreign . . . *for any act, matter, or thing, loss, damage,* or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, *shall not,* except in the cases provided for in subsection (b) of this section, *exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.*" (emphasis added)

[12] Zapata's total claim is $3,500,000. ($3,000,000 for repairs; $500,000 for loss of use). Unterweser seeks to limit its liability to its interest in the BREMEN, alleged to be $1,390,000. Accordingly, the privilege sought by Unterweser to limit its liability is worth $2,110,000, if there are no other claims.

rowing for those on board.[13] As Unterweser put it, "In view of the nature of the casualty involved, no one could say, least of all Unterweser, that no other claims would be filed." (Reply Brief in Court of Appeals, p. 11).

To compel the concourse, Unterweser, in its limitation suit, sought and obtained an *ex parte* injunction restraining further prosecution of Zapata's suit, No. 68-21, in which Unterweser had taken 8 oral depositions and conducted extensive discovery going to the merits, not to jurisdictional matters raised in Unterweser's motions.[14]

In its Tampa action Unterweser seeks, in addition to the privilege of limitation of liability and the benefits of a concourse of claims, affirmative recovery from Zapata for:

1. the contract damages claimed also in London;

2. a recovery in tort for negligent damages to the BREMEN's tow gear; and

3. salvage services rendered to the wrecked CHAPARRAL. Unterweser alleged its salvage services were *not* contemplated by the towage contract and consisted of services *outside* the contract. (A. 116). (Zapata feels the same way about Unterweser's towing the rig with its legs unlocked,

---

[13] Following the loss, the eight Americans and three Germans on the CHAPARRAL had to leave the rig and were rescued by the BREMEN's crew. Several of Zapata's crew members received injuries while leaving the wrecked CHAPARRAL. Also, the voyage was terminated because of the casualty. These American crew members could have filed claims against Unterweser for damages and/or lost wages. Potential claims existed at the time Unterweser filed its limitation action.

This court has held repeatedly that one of the objectives of a limitation proceeding is to provide the shipowner, seeking to limit its liability, a *concourse* to try all claims that may be asserted against it. *Providence & N.Y. S.S. Co.* v. *Hill Mfg. Co.*, 109 U.S. 578 (1883), 594-595; *Hartford Accident & Indemnity Co.* v. *Southern Pac. Co.*, 273 U.S. 207 (1927), at 215;

across the deepest part of the Gulf of Mexico, in disregard of Zapata's instructions to tow the CHAPARRAL in jack-up water depths).

The Tampa District Court, in a limitation proceeding, sits as a court of equity and has before it all of the controversies between Zapata and Unterweser arising out of the casualty and the voyage in question. That it can and should do complete justice to all parties in this limitation proceeding was laid down by Chief Justice Taft in *Hartford Accident & Indemnity Co.* v. *Southern Pac. Co.*, 273 U.S. 207 (1927), at 215-216:

> "It is quite evident from these cases that this court has by its rules and decisions given the statute a very broad and equitable construction for the purpose of carrying out its purpose, *and for facilitating a settlement of the whole controversy over such losses as are comprehended within it, and that all the ease with which rights can be adjusted in equity is intended to be given to the proceeding. It is the administration of*

Spencer Kellogg Co. v. *Hicks*, 285 U.S. 502 (1932), at 512; *British Transport Commission* v. *United States*, 354 U.S. 129 (1957), at 136.

[14] The first filed suit was being litigated hammer and tongs by Zapata and Unterweser until Unterweser obtained the limitation injunction. 35 depositions (2170 pages of testimony) had been taken. Unterweser had made very good use of the district court's judicial processes in Zapata's suit. Unterweser noticed and took in Tampa, Florida, the oral depositions of the Zapata employees on the CHAPARRAL for the purpose of discovery *and for use at trial*. (A. 34-35; 150-151). Unterweser noticed and took in New Orleans oral depositions of two marine surveyors, Noel Thompson and John Hellendoorn, for purpose of discovery. (A. 43; 151). Unterweser filed on February 27, 1968 a Motion for Production of Documents. (A. 37-41). This motion was settled, and Zapata produced for Unterweser's inspection some 700 pages of documents. (R. 155). Zapata submits this conduct on the part of Unterweser constituted a waiver of its various motions addressed to the court's jurisdiction and amounted to a consent to the court's continuing exercise of jurisdiction in the first filed suit.

equity in an admiralty court. . . . It looks to a complete and just disposition of a many-cornered controversy. . . ." (emphasis added)

In *British Transport Commission* v. *United States*, 354 U.S. 129 (1957), affirming the Fourth Circuit, 230 F.2d 139 (1956), the questions were whether a limitation petitioner could cross-claim against one of the claimants and whether claimants could cross-claim amongst themselves. The Fourth Circuit felt such cross-claims were proper, holding, at 145:

> "Modern codes of procedure have reflected two facets: (1) all rights if this can fairly be done, should be decided in a single legal proceeding; (2) *parties who submit themselves to the jurisdiction of a court in a legal proceeding should be bound by that court's decision on all questions, appropriate to and seasonably raised in that proceeding.*" (emphasis added)

This Court, in affirming the Fourth Circuit, said, 354 U.S. 129, at 137:

> ". . . The question is not what 'tag' we put on the proceeding, or whether it is a 'suit' under Rule 56 or a libel in personam, or whether the pleading is of an offensive or defensive nature, *but rather whether the Court has jurisdiction of the subject matter and of the parties.* It is sufficient to say as did Chief Justice Taft for a unanimous Court in *Hartford Accident & Indemnity Co. of Hartford* v. *Southern Pacific Co.*, 1927, 273 U.S. 207, . . . *'that all the ease with which rights can be adjusted in equity is intended to be given to the [limitation] proceeding. It is the administration of equity in an admiralty court. . . . It looks to a complete and just disposition of a many-cornered controversy . . . .'*" (emphasis added)

The Salvore, 36 F.2d 712 (2d Cir. 1929), presented a litigation context much like the one arising out of the voyage

of the BREMEN and the CHAPARRAL. American plaintiffs sued and served an Italian shipowner in New York for cargo damage. The Italian shipowner sued the New York plaintiffs in Italy for wrongfully arresting one of its ships under writ of foreign attachment issued in the New York suit. Then the Italian shipowner started a suit for limitation in New York. There was no forum clause involved. In its limitation suit the shipowner obtained an injunction against further prosecution of the cargo claims in the first filed suit. Directing the district court to dissolve the limitation injunction unless the shipowner agreed to stay the suit in Italy until the determination of the New York litigation, the Second Circuit observed at 713 that: "The limitation proceeding was an appeal to a court of admiralty, which is a court of equity, invoking the aid of the court, and the appellee [shipowner], seeking equity, should willingly do equity, if it wants the benefit of avoiding a multiplicity of suits and limiting its liability. . . . It must be willing to bring in all the controversies in the limitation proceedings, for it has invoked the court's aid."

Regarding the power of the district court to deal with the shipowner, the Second Circuit continued at 714: "The court below having obtained prior jurisdiction of the parties, and the appellee [shipowner] having sought that same jurisdiction in its limitation proceedings, unquestionably gave the court the power to deal with the appellee before it as equity and justice required." The Second Circuit went on to note that the court first obtaining jurisdiction has the authority and the power to enjoin the parties from litigating in another jurisdiction, pointing up the distinction between restraining the action of the foreign tribunal, which it could not, and restraining parties before it, which it could do.

In 1955, the Second Circuit, citing The Salvore, *supra*,

held a district judge was "clearly correct" in exercising his power in a limitation suit to compel the shipowner seeking limitation to obtain a stay of its suit in another circuit relating to the collision with respect to which limitation was sought. *A. C. Dodge, Inc. v. J. M. Carras, Inc.*, 218 F.2d 911 (2d Cir. 1955).[15]

In his dissent from the Court of Appeals Judge Wisdom agreed that if the district court properly retained jurisdiction, *it properly enjoined prosecution of the London action.* (A. 281). And Unterweser, who argued in the district court and the court of appeals that (1) the district court lacked the power to enjoin Unterweser from proceeding in London at all, and (2) the facts in this case did not justify the injunction even if jurisdiction were retained, seems to have abandoned lack-of-power argument in this Court.

To avail itself of the *privilege* the statutory law of the United States confers on domestic and foreign shipowners, Unterweser filed the limitation suit in Tampa. Unterweser was under no *legal duty* to seek this *privilege.*[16] Analysis is not much aided by Unterweser's argument that it was forced or compelled to file for limitation of liability because the district court had not ruled on its motions and the six month statute of limitations was about to run. If the district judge had entered his order of July 29, 1968 on May 29, 1968 or sooner, or later, the statutory period for suing for limitation of liability would have continued

---

[15] The district judge had dissolved the limitation injunction with the proviso that it would be reinstated if the shipowner obtained a stay of its other suit within four days.

[16] "The vessel owner . . . . *may* petition a district court . . . for limitation of liability. . . . ." 46 U.S.C. § 185. (emphasis added)

(1) "any vessel owner *may* file a complaint in the appropriate district court . . . for limitation of liability pursuant to statute. . . ." Supplemental Rule F, Federal Rules of Civil Procedure. (emphasis added)

The language is obviously permissive.

to run.[17] In any case, Unterweser would have faced the need for decision whether to *sue* for limitation of liability early in July.[18]

The Tampa court, having obtained prior jurisdiction of the parties in Zapata's suit against Unterweser and the BREMEN, and Unterweser having invoked the jurisdiction of the same court in its suit for limitation, recognized that it had the power to deal with the parties as equity might require.[19]

---

[17] In effect, Unterweser's option to seek limitation affirmatively, under § 185, was going to expire on July 12, 1968, six months after receipt of Zapata's first written notice of intention to claim.

[18] Unterweser could have obtained the protection of the limitation statutes as against Zapata by raising limitation as a defense to Zapata's suit. *Coryell* v. *Phipps*, 317 U.S. 406, 407-8 (1943). Defense of limitation *set up in answer* under § 183. This Court held: ". . . courts below were correct in allowing the limitation of liability under § 4283." [now § 183, 46 U.S.C.], affirming 128 F.2d 702 (5th Cir. 1942), which affirmed 39 F. Supp. 142 (S.D. Fla. 1941), where style was *Coryell* v. *Pilkington*, and in which the distinction was considered on p. 145; *Murray* v. *New York Central Railroad Co.*, 287 F.2d 152, 153 (2d Cir. 1961); *Deep Sea Tankers* v. *The Long Branch*, 258 F.2d 757 (2d Cir. 1958), at pp. 772-773; *The Chickie*, 141 F.2d 80 (3d Cir. 1944), at pp. 84-85.

[19] In its Order of January 21, 1969, the District Court correctly observed: "Limitation proceedings are considered to be equitable in nature. . . . The Court having once taken jurisdiction in the limitation proceedings may proceed to determine all matters relating to the controversy. . . . In seeking the benefits of the Limitation Act, Unterweser should recognize that this Court has jurisdiction to determine the entire controversy. In aid of this jurisdiction, it may be, and it is, in this case, necessary to require that duplicity of litigation be terminated. . . . In the case at bar there are only two parties litigating the dispute occasioned by the events of January 9, 1968. Suit was initially filed in this Court, this Court has ruled that it does have jurisdiction over the controversy, and this Court also has taken jurisdiction in the limitation action. The proposition that the case should at the same time be prosecuted in another forum is not well received.

"Although Unterweser again argues in its Motion to Stay that

The Court of Appeals, affirming, concluded:

(1) that Unterweser's petition for limitation subjected it to the full equitable powers of the district court (A. 237);

(2) that the forum clause *in and of itself* did not *compel* the district court to stay proceedings in the limitation action so that the parties might litigate in England (A. 241);

(3) that apart from the forum clause the circumstances supported a retention and determination by the district court (A. 241); and

(4) that the district court did not abuse its discretion in choosing not to relegate Zapata to the London forum. (A. 244).

We next consider, in detail, the forum clause which Unterweser has argued:

---

the venue provisions of the towage contract are *controlling*, this Court has already passed on that contention. While at that time the Court did not rule that Unterweser could not proceed with an action in the London Court, the same considerations recited as a basis for retaining jurisdiction in the Order of July 29, 1968, are determinative of this issue. *In addition*, Unterweser has *voluntarily invoked this Court's jurisdiction* in filing this limitation proceeding in which Zapata has filed claim and answer and joined issue, and also Unterweser has invoked this Court's jurisdiction in filing its counterclaim against Zapata upon which issue has also been joined.

"This Court having first acquired jurisdiction over the parties and the subject matter of this controversy both through the complaint in 68-21 Civ. T. and the limitation action filed by Unterweser in this cause, does have the power to restrain the parties before it from litigating the same matters elsewhere. . . . *"The balance of convenience is strongly in favor of litigation in this forum initially* and to allow the same action to be prosecuted simultaneously elsewhere would cause inequitable hardship. Such an action could only tend to frustrate and delay the speedy and efficient determination of the cause in this Court. The Court feels that the parties being properly before it should be restrained from proceeding further in the foreign court." (A. 225, 227-8). (emphasis added).

(1) *defeated* the jurisdiction of the district court (A. 81);

(2) is *controlling* (A. 227); and

(3) *required* a stay of the limitation case (A. 238).

II

The Forum Clause, Which Unterweser Drafted, (1) Is Non-Exclusive; (2) Is Not Addressed to an Action in Rem; and (3) Does Not Purport, and Should Not Be Construed, to Apply to Zapata's Claim in a Limitation Action Unterweser Commenced.

The forum clause provides:

> "Any dispute arising must be treated before the London Court of Justice."[20]

A reading of the clause drafted by Unterweser demonstrates that the usual exclusive jurisdiction clause language, e.g., "to the exclusion of any other judge"[21] or "to the exclusion of proceedings in the courts of any other country"[22] *was not used.* The clause confers jurisdiction

---

[20] General Towage Conditions, Par. 8. (A.27).

[21] A typical example of *exclusionary* language is:

> *"This agreement shall be subject to the Law of the Netherlands.* The settlement of all disputes arising from this agreement shall, *to the exclusion of any other judge,* be submitted to the District Court at Rotterdam. . . ." *Chemical Carriers, Inc.*, v. *L. Smit & Co.'s Internationale Sleepdienst*, 154 F.Supp. 886 (S.D.N.Y. 1957), at 888. (emphasis added)

[22] Another typical example is:

> "Governing Law: Unless otherwise herein expressly provided this Bill of Lading *shall be construed by Japanese Law,* and the rights of the parties thereunder determined accordingly. Any claim for loss, damage . . . arising out of this Bill of Lading shall be dealt with, at the option of the carrier, in the courts of Japan *to the exclusion of proceedings in the courts of any other country." Takemura & Co.* v. *The S.S. Tsuneshima Maru*, 197 F.Supp. 909 (S.D.N.Y. 1961), at 910. (emphasis added)

on the London Court but stipulates nothing in restriction of proceedings in other courts.[23] Such agreements should be strictly construed and not extended by implication.[24]

The omission was not the result of any unfamiliarity with the concept on Unterweser's part. Unterweser's towage contracts ordinarily provide for ". . . *exclusive* German jurisdiction and for the application of German law." (von Aswegen Affidavit, A. 22). The contract, with the forum clause, was drafted in Germany by Unterweser; the forum clause was unchanged in the final draft; and there was no discussion of the clause by the parties' representatives before or after Unterweser tendered its draft of the

---

[23] A provision that:

> "Any dispute arising under this Bill of Lading shall be decided in the country where the Carrier has his principal place of business, and the law of such country shall apply except as provided elsewhere herein."

elicited this comment from Judge Friendly speaking for the Second Circuit en banc:

> "Other possible bases [of distinction from *Muller*] would be the failure of the instant bill of lading to identify within its four corners the forum to which litigation was *confined*. . . ." *Indussa Corp.* v. *S.S. Ranborg*, 377 F.2d 200 (2d Cir. 1967) at 202. (Emphasis added)

Judge Moore, concurring with the result at p. 205, said: "The bill [of lading] itself contained no clear contractual agreement *providing for exclusive jurisdiction* in Norwegian courts. Furthermore, the action here was solely against the ship *in rem*." (emphasis added)

[24] *The Monrosa* v. *Carbon Black Export, Inc.* 359 U.S. 180, 182-3 (1959): ". . . we will not stretch the language when the party drafting such a form contract has not included a provision it easily might have."

Engel v. *Shubert Theatrical Co.*, 151 N.Y.S. 593 (Sup. Ct. App. Div. 1915). The forum clause read: "In case of dispute, both contracting parties agree to submit to the jurisdiction of the Vienna courts." Court overruled defendant's contention it was immune from suit in the New York court, held the parties did not agree to submit their disputes to Vienna courts *only*, and that "*it is entirely plain that such agreements should be strictly construed, and should not be extended by implication.*" (emphasis added)

contract to Zapata.[25] If there is doubt whether the clause provided for *exclusive* London jurisdiction, that doubt must be resolved against Unterweser, the draftsman.[26]

In addition, the forum clause does not apply to the *in rem* proceeding against the BREMEN in Zapata's first filed suit. The distinction between suits *in personam* and those *in rem* to enforce maritime liens has been recognized in the courts of maritime nations from time immemorial.[27] Unterweser's appreciation of the distinction is shown by these provisions in the contract it drafted:

> (1) the stipulation for a *lien* on the CHAPARRAL for the towage charge in paragraph 9 (A. 26);
>
> (2) the stipulation for penalties incurred by "Urag or by the *tug* . . .", to be reimbursed by Zapata, in paragraph 11 (A. 26);
>
> (3) the "Claim and Suit" provision in paragraph 12: "Urag and the *tug* . . . shall be discharged from liability unless . . ." a claim in writing is made, and an action is brought, within a specified time period. (A.26).
>
> (4) the indemnity provisions in favor of Unterweser, paragraph 4 of the "General Towing Conditions", as to ". . . the liability of the tug . . ." (A.27). (emphasis added)

---

[25] Affidavit of Hoyt Taylor, Zapata's Vice President. (A. 62, 63).

[26] 17A C.J.S., § 324, Construction Against Party Using Words, p. 217, et seq., states:

> "It is a general rule of construction that where a contract is ambiguous it will be construed most strongly against the party preparing it or employing the words concerning which doubt arises; . . . and any ambiguity in a contract, doubt or uncertainty as to its meaning should be resolved *against the party who prepared the contract or is responsible for the verbiage.*" (emphasis added)

[27] Benedict on Admiralty, 6th Ed., vol. 1, §§ 11 and 12, pp. 17-24; Gilmore Black, *The Law of Admiralty* (1947), §1-12, p. 30 et seq.

But the Unterweser drafted forum clause does not mention actions "in rem", claims or actions "against the tug".

In deciding *The Monrosa* v. *Carbon Black Export, Inc.*, 359 U.S. 180 (1959), this Court observed that the forum clause spoke of proceedings against ". . . the Captain or Shipowners of their Agents . . ." (at p. 182). Another clause in the bill of lading there under consideration specifically recognized suits both *in rem* and *in personam* where it provided " . . . the Carrier and the ship shall be discharged from all liability . . .", unless a claim was made in writing, and an action brought, within a specified time. (footnote, at 182). The Court said the language in the forum clause was particularly appropriate to a restriction of the clause to *in personam* actions, noted the shipowner was the draftsman, refused to "stretch" the language, and held the forum clause did not apply to the *in rem* action.

The right to proceed *in rem* is of enormous importance to maritime litigants. Through action against the vessel the plaintiff may obtain security to respond to judgment from a foreign shipowner-defendant whose sole asset may be the offending vessel. Without the security, the United States plaintiff may get a judgment, *in personam*, only to find that the vessel has incurred maritime liens later in time but higher in priority than his judgment, or has been employed in a trade that never brings it to this country, or even has been lost completely. The result is the same: a plaintiff with a judgment and insufficient assets of the defendant upon which the marshal can levy. These are the considerations which prompted the Court of Appeals for the Fifth Circuit to observe:

> "Moreover, something deeply significant in the whole field of maritime law is here at stake. With respect to ocean going carriers it seems that one of the most uni-

versally recognized rules of law is that which gives the right to libellant, possessing a maritime lien against the vessel, to proceed *in rem* in the jurisdiction where the vessel is found."[28]

That part of Zapata's first filed suit brought *in rem* against the BREMEN asserted a maritime lien (A.9) and sought recovery for negligent towage (A.8, 9), a maritime tort. It did not even colorably contravene Unterweser's forum clause.[29]

But more importantly the forum clause should not be construed to preclude Zapata from filing and prosecuting its claim in the limitation suit Unterweser started or from answering the counterclaim Unterweser there asserted against Zapata, because:

1. The forum clause neither expressly nor by implication precludes assertion of claims in Unterweser commenced proceedings in a non-contract forum, and

2. Unterweser subjected itself to the jurisdiction of the district court by filing the limitation of liability suit in Tampa. This constituted a waiver of the forum

---

[28] *Motor Distributors Ltd.* v. *Olaf Pedersen's Rederei, A/S*, 239 F.2d 463 (5th Cir. 1957), at 467.

[29] It has long been settled that suit by the owner of a tow against her tug to recover for an injury to the tow caused by negligence on the part of the tug is *ex delicto* and not *ex contractu*. *Stevens* v. *The White City*, 285 U.S. 195 (1932); *South, Inc.* v. *Moran Towing and Trans. Co., Inc.*, 360 F.2d 1002 (2d Cir. 1966); *Bisso* v. *Waterways Trans. Co.*, 235 F.2d 741 (5th Cir. 1956). This Court, in *Stevens* v. *The White City, supra*, held (285 U.S., at 202):

> "... And the rule that the lien for damages occasioned by negligent towage takes precedence of liens for supplies previously furnished the offending vessel rests upon the ground that the claim, like those in collision, *is one in tort* arising out of the duty imposed by law *and independently of any contract or consideration for the towage.*" (emphasis added)

clause, or estopped Unterweser from relying upon it with respect to responses the limitation suit evoked.

In fairness we should say that we do not understand Unterweser to argue that the forum clause should *preclude* Zapata from responding to the limitation action.

The majority of the courts to which such clauses have been presented for enforcement have held that they are void and not to be enforced at all.[30] If, however, the forum clause is enforceable at all, it is only enforceable if reasonable. So far as we have found, no American court has considered itself *bound* to remit a party to a forum stipulated by contract without regard to facts and circumstances extrinsic to the contract. We next address ourselves to the question whether enforcement of the forum clause in Unterweser's towage contract would have been reasonable in the circumstances.

III

Unterweser's Motion to Stay Was Properly Denied Because It Would be Unreasonable to Enforce the Forum Clause Under the Facts of This Case.

Those courts which have not disregarded the forum clause altogether have looked to the circumstances in each case to see if enforcement was reasonable at the time of litigation and not at the time of contract.[31]

---

[30] Annot., 56 A.L.R.2d 300 (1957); 17 C.J.S., Contracts, § 229(1), p. 1069 (1963 Ed.).

[31] ". . . The modern and correct rule is, that . . . a court . . . should decline to proceed with the cause when the parties have freely agreed that litigation shall be conducted in another forum *and where such agreement is not unreasonable at the time of litigation.*" *Central Contracting Co.* v. *C.E. Youngdahl & Co.*, 209 A. 2d 810 (Sup.Ct. Pa. 1965) at 816 (emphasis added);

Factors to be Considered

Factors the courts have considered relevant in deciding (1) whether enforcement of a forum clause was reasonable; or, (2) whether a party should be relegated to a foreign court under the doctrine of *forum non conveniens* in particular cases, include:

1. Whether the rights or remedies of the party resisting enforcement will be diminished substantially if he is compelled to litigate in a foreign forum;[32]

2. Whether there was a significant difference in the availability of testimony and other evidence militating in favor of one forum over the other;[33]

"There will always be open to either party the opportunity to present whatever evidence will move a court *in the particular circumstances* not to decline to exercise its undoubted jurisdiction." *Central Contracting Co.* v. *Maryland Casualty Co.*, 367 F. 2d 341 (3rd Cir. 1966), at 345 (emphasis added);

"But if in the proper exercise of its jurisdiction, by a preliminary ruling the court finds that the agreement is not unreasonable *in the setting of the particular case* it may properly decline jurisdiction and relegate a litigant to the forum to which he assented." *Wm. H. Muller & Co., Inc.* v. *Swedish American Line Ltd.*, 224 F. 2d 806 (2d Cir. 1955), at 808. (emphasis added)

[32] *Chemical Carriers, Inc.* v. *L. Smit & Co.'s Internationale*, 154 F.Supp. 886 (S.D.N.Y. 1957); towage contract; plaintiff deprived of remedy in foreign forum, case retained; *Wm. H. Muller & Co., Inc.* v. *Swedish American Line Ltd.*, 224 F.2d 806 (2d Cir. 1955) plaintiff's rights not significantly affected, case declined; *General Motors Overseas Operations* v. *S.S. Goettingen, et al.*, 225 F.Supp. 902 (S.D.N.Y. 1964) plaintiff's rights affected, case retained; *Takemura & Co.* v. *The S.S. Tsuneshima Maru*, 197 F.Supp. 909 (S.D.N.Y. 1961) plaintiff's rights not significally affected, case declined.

[33] *Hawaii Credit Card Corp.* v. *Continental Credit Card Corp., et al.*, 290 F.Supp. 848 (D.C. Hawaii 1968) case retained because most evidence in non-contract forum; *Murillo Ltda.* v. *The Bio Bio*, 127 F.Supp. 13 (S.D.N.Y. 1955), aff'd *per curiam*, 227 F.2d 519 (2d Cir. 1958); *Wm. H. Muller & Co., Inc.* v. *Swedish American Line Ltd., supra; Takemura & Co.* v. *The S.S. Tsuneshima Maru, supra.*

3. The citizenship of the parties and the nationality of the vessels involved;[34]

4. Which forum had more significant contacts with the subject matter of the litigation;[35]

5. Where the contract was to be, or had been, performed;[36]

6. Whether the contract had been procured through the fraud or overreaching of the party seeking enforcement;[37]

7. Whether the foreign forum would accept the case and decide the dispute.[38]

To the factors presented by the record in this case for the consideration of the District Court and the Court of Appeals we now turn.

As to the Effect of Enforcement on Zapata's Substantive Rights

Under English law the exculpatory clauses in the tow-

---

[34] *Swift & Co. Packers* v. *Compania Colombiana Del Caribe S.A.*, 339 U.S. 684 (1950) suit by U.S. citizen against foreigner evokes different considerations from suit between foreigners; *Volkswagen of America, Inc.* v. *S.S. Silver Isle*, 257 F.Supp. 562 (N.D. Ohio 1966) libelants American nationals, Court's discretion further limited; *States Marine Lines, Inc.*, v. *The M/V Kokei Maru*, 180 F.Supp. 255 (N.D. Cal. 1960) American nationality of libelant sufficiently important to justify retention.

[35] *Cerro De Pasco Copper Corp.* v. *Knut Knutsen*, O.A.S., 187 F.2d 990 (2d Cir. 1951); *Wm. H. Muller & Co., Inc.* v. *Swedish American Line Ltd., supra; Murillo Ltda.* v. *The Bio Bio, supra.*

[36] See cases, footnote 35.

[37] Zapata does not contend Unterweser procured contract through fraud or overreaching.

[38] Zapata concedes the London court would take the case and try it.

age contract[39] would be enforced so as to relieve Unterweser from liability for its own negligence in the performance of the tow.[40] In the United States those same exculpatory clauses should not, under *Bisso* and *Dixilyn*,[41] be effective to relieve Unterweser of such liability, because United States courts apply United States maritime law to high seas torts between American and foreigners.[42] And United States courts will not enforce exculpatory provisions that are valid under English law if

---

[39] "1. . . . URAG [Unterweser], their masters and crews are not responsible for defaults and/or errors in the navigation of the tow.

"2(b) Damages suffered by the towed object are in any case for the account of its Owners. [Zapata]". (A. 26).

[40] Opinion of English maritime law expert Bateson (A. 65-71). Affidavit filed in district court on April 22, 1968. Unterweser has not filed a controverting affidavit.

Unterweser suggests at p. 25 of its brief that it is premature and speculative to assume that an English court would apply English law to the contract. But Mr. Justice Karminski said the inference when parties have agreed on a forum is that the forum law is intended to be applicable. (A. 211, 212). And Lord Justice Willmer says that Unterweser argued that English law would govern the contract as a ground upon which the London Court should grant leave to serve Zapata outside England. (A. 216, 217).

English court recently concluded English law governed a contract (which did not provide applicable or controlling law) when comity might have prompted a conclusion that the law of the Netherlands applied. *Coast Lines Ltd.* v. *Hudig & Veder N.V.*, 2 Lloyd's Rep. 390 (1971).

[41] *Bisso* v. *Inland Waterways Corp.*, 349 U.S. 85 (1963). *Dixilyn Drilling Corp.* v. *Crescent Towing & Salvage Co.*, 372 U.S. 697 (1963) [following Bisso], reversing Fifth Circuit Court of Appeals, 303 F.2d 237 (1967). *Dixilyn* firmly settles law. Exculpatory provisions void and unenforceable, even when towage contract proven to have been freely negotiated and proof shown towage rate reduced in consideration of exculpatory clause. See also, *Offshore Company* v. *G. & H. Offshore Towing Co.*, 262 F.Supp. 282, 288 (S.D. Tex. 1966).

[42] *The Scotland*, 105 U.S. 24 (1881); The Belgenland, 114 U.S. 355 (1885); The Gylfe v. The Trujillo, 209 F.2d 386 (2d Cir. 1954).

they are violative of United States public policy even if English law were otherwise applicable.[43] Our courts determine the amount of the limitation fund under American law.[44]

If it be assumed that the English court would not give effect to the exculpatory clauses and on the evidence would find Unterweser guilty of negligence producing the loss, but would go on to find that Unterweser was entitled to limit its liability, the amount of the limitation fund in England would not exceed $80,136.[45] If the American court found the exculpatory clauses ineffective to relieve Unterweser of liability, found that the loss was the result of Unterweser's negligence, and found that Unterweser was entitled to limit its liability, the amount of the limitation fund would be not less than $1,390,000.

This striking difference in results on the same findings as to cause of loss and entitlement to limitation flows from the fact that, since this was a high seas incident and maritime torts are involved, each court would apply its own law in connection with the limitation fund. The English limitation fund is determined by the tonnage of the vessel and, the BREMEN being a tug of comparatively small tonnage, the fund is likewise small ($80,136). The limitation fund in this country would be determined by the value of the BREMEN at the end of the voyage. Unterweser has stipulated that the value of the BREMEN at the operative time was not less than $1,390,000.

---

[43] *The Kensington*, 183 U.S. 263 (1902); *Oceanic Steam Nav. Co.* v. *Corcoran*, 9 F.2d 724 (2d Cir. 1925)

[44] *The Titanic*, 233 U.S. 718 (1914); *The Western Farmer*, 210 F.2d 754 (2d Cir. 1954).

[45] Unterweser (A. 91) and English maritime law expert Bateson (A. 324-329) agree the English limitation fund would not exceed 33,600 pounds sterling, the equivalent of $80,136.

Following *Muller*[46] and applying its test of reasonableness, the district courts in New York have declined to relegate the plaintiff to a foreign forum where the practical effect of enforcement might deprive the party resisting the forum clause of all remedy,[47] or would substantially affect its substantive rights.[48]

In *Central Contracting Co.* v. *Maryland Casualty Co.*, *supra*, the Third Circuit, in passing on the reasonableness

[46] *Wm. H. Muller & Co., Inc.*, v. *Swedish American Line Ltd.*, 224 F.2d 806 (2d Cir. 1955). Where there were (1) a Swedish shipowner (who had *not* started a limitation suit in the U. S.), (2) Swedish crew-members all residing in Sweden, (3) most of the evidence available in the Swedish court, (4) an *exclusive* Swedish forum clause, (5) no American fact witnesses, (6) *undisputed showings that the Swedish court would apply the same measure of damages as American maritime courts, and* (7) *that limitation proceedings under Swedish law were no more restrictive than under American law*, the Second Circuit Circuit held the forum clause was not unreasonable and would be enforced.

[47] *Chemical Carriers, Inc.* v. *L. Smit & Co.'s Internationale Sleepdienst*, 154 F.Supp. 886 (S.D.N.Y. 1957). Dutch tug (Smit), on voyage tow (Chemical Carriers vessel), salvaged German ship. Under American law Chemical Carriers was entitled to participate in salvage award, but not so under Netherlands law. Court refused to enforce exclusive forum clause (Rotterdam) because to do so would be unreasonable, holding (888): ". . . in view of . . . Netherlands law, the practical result of compelling libelant to litigate in Rotterdam courts might well be to deprive it of all remedy". The court, recognizing the reasonableness test of *Muller* was applicable, distinguished same, pointing out ". . . there was no showing [in *Muller*] . . . . that the libelant would be without effective remedy in the foreign forum."

[48] *General Motors Overseas Operations* v. *S. S. Goettingen*, 225 F.Supp. 902 (S.D.N.Y. 1964). The court, applying *Muller* test of reasonableness, declined to enforce forum clause on ground that to remit plaintiffs to German courts would *substantially affect their rights*. The interpretation of "peril of the sea" under German law was such that a storm, not severe enough to free a carrier from liability under American law, might be sufficient under German law to free the carrier from liability. The court distinguished *Muller* saying (906): ". . . the Court [*Muller*] clearly pointed out that the foreign law would be 'no more restrictive' than United States law on the shipper's rights."

of a forum clause (to relegate from Pennsylvania to New York) held: ". . . it should be respected . . . *so long as there is no proof that its provisions will put one of the parties to an unreasonable disadvantage and thereby subvert the interests of justice.*" (367 F.2d, at 345). (emphasis added) And further stated: "We are mindful that cases may be imagined in which the requirement of a contract limiting resort to a single forum may be the instrument of injustice."

Section 3 of the Model Choice of Forum Act, approved by the National Conference of Commissioners on Uniform State Laws (1968) adopts this principle. 17 Am. J. Comp. L. 294-295 (1969).[49]

Reese also adopts this view.[50]

The district court in ruling on Unterweser's jurisdiction-contesting motions in Zapata's first suit stated: "Plaintiff [Zapata] has made an undisputed showing that English courts apply different tests and rules of liability in cases of this type than do many of the courts of this country." (A.82).

As correctly stated by the Fifth Circuit: "The district court was entitled to consider that remanding Zapata to a foreign forum, with no practical contact with the contro-

---

[49] "Section 3 [Action in Another Place by Agreement.] If the parties have agreed in writing that an action shall on a controversy be brought only in another state and it is brought in a court of this state, the court will dismiss or stay the action, as appropriate, unless . . . .

(2) *the plaintiff cannot secure effective relief in the other state,* for reasons other than delay in bringing the action, . . ." (emphasis added).

[50] ". . . effect should be denied the [forum] clause if there is reason to believe that the courts of the selected state would . . . *deny [plaintiff] relief to which he was entitled. . . .*" (emphasis added) Reese, *The Contractual Forum: Situation in the United States,* 13 Am. J. Comp. L. 187, 189 (1964)

versy, *could raise a bar to recovery by a United States citizen . . .*" (A.243). The Court of Appeals also held: "Zapata, the only claimant in the limitation action, is a United States citizen. The discretion of the district court to remand the case to a foreign forum was consequently limited. This is especially true since, as the court noted, there are indications that *Zapata's substantive rights will be materially affected if the dispute is litigated in an English court.*" (A.242). (emphasis added)

It would be unreasonable to relegate Zapata to the English forum where it would probably be deprived of a remedy available to it in the American court, and where the English limitation fund amounts to about 6% of the American fund.

As to the Balance of Convenience of Putting on Proof at Trial

At any trial which disposes of all the controversies between the parties, there will have to be evidence on these issues:

1. Whether Unterweser was instructed by Zapata to tow the rig in jack-up water depths, as the CHAPARRAL's legs had not been locked together (A.108);

2. Whether Unterweser complied with the instructions it received from Zapata so to proceed (A.109);

3. Whether the CHAPARRAL was seaworthy for the intended voyage from the Mississippi Passes to the Florida Straits in coastwise waters, i.e., jack-up water depths;

4. The amount of the loss Zapata has sustained by reason of repairs to physical damage and by reason of loss of use of the CHAPARRAL;

5. The value of the CHAPARRAL as she was brought to refuge at Tampa;

6. The value of the BREMEN as of the end of the voyage at Tampa;

7. The amount of the loss Unterweser has sustained as a result of the physical damage to the BREMEN's towing gear suffered when the bow leg of the CHAPARRAL fell;

8. The amount to which Unterweser is entitled for hire from the time the voyage ended at Tampa; and

9. What services were rendered by Unterweser (alleged to constitute salvage) in re-establishing the towing connection with the CHAPARRAL after the casualty.

The location of the sources of the evidence on these issues is:

1. As to the routing instructions, Zapata's evidence will consist of the testimony of Zapata's Hoyt Taylor and James Booth, both of Houston (A.415), and marine surveyors Noel Thompson of New Orleans and John Hellendoorn of New Jersey (A.145). So far as can be seen, Unterweser's evidence on this issue will consist of the testimony of Marine Superintendent Otto Litwinski and Captain Diedrich Kriete, both residents of Germany and both of whom have been deposed.

2. As to Unterweser's compliance with the instructions received, Zapata's evidence will consist of the testimony of (a) rig mover Oscar Willard of Houston, Texas, (b) tool pusher Wilton Johnson, resident of Louisiana (A.145), and (c) the depositions of Captains Litwinski and Kriete.

3. As to the seaworthiness of the CHAPARRAL for the intended voyage, Zapata's evidence will consist of the testimony of (a) Messrs. Thompson and Hellendoorn (A.145),

already mentioned; (b) Mr. Booth and Mr. Willard (A.145); (c) a representative of Breit Engineering Co. of New Orleans (this company did pre-voyage studies of the stability of the CHAPARRAL as she was fitted out for the tow) (A.146); (d) Sam Bryan of Shilstone Testing Laboratories, Houston, Texas (a metallurgist who examined and tested portions of the remains of the damaged legs of the CHAPARRAL following her arrival at Tampa) (A.146); (e) several representatives of R. G. LeTourneau, Inc. of Longview, Texas, the builders of the CHAPARRAL and the concern which assisted in preparing the CHAPARRAL for the voyage in tow of the BREMEN (A.146). Unterweser's evidence will surely include the testimony of (a) Rush Johnson and J. R. Bencal, marine surveyors of Houston who examined the CHAPARRAL at Tampa in her then damaged condition (A.146); and (b) representatives of Pittsburgh Testing Laboratories at Tampa and at Pittsburgh [illegible] examined and performed metallurgical tests upon the [illegible]ons of the remains of the damaged legs of the CHAPA[illegible]RAL. (A.146).

4. As to the amount of the loss Zapata has sustained as a result of the physical damage repairs and related services, Zapata's evidence will include the testimony of (a) New Orleans marine surveyor Joseph Tynan, who examined the CHAPARRAL and made a post casualty condition report at the request of Zapata (A.146); (b) representatives of R. G. LeTourneau, Inc., the company which accomplished the repairs to the CHAPARRAL; and (c) representatives of 14 companies that rendered various services. (A. 147-148). Unterweser's evidence will surely include that of their marine surveyors, Johnson and Bencal, above mentioned.

As to the value of the loss of use of the CHAPARRAL, Zapata's evidence will include the testimony of its managerial level operating personnel based in Houston.

5. As to the value of the CHAPARRAL upon arrival at Tampa (from which any salvage award would have to be carved), Zapata's evidence would include the testimony of (a) New Orleans surveyor Tynan, representatives of R. G. LeTourneau, Inc. of Longview, Texas; and (b) Houston based Zapata personnel. Unterweser's evidence will probably include testimony of Messrs. Johnson and Bencal of Houston. There is, of course, no area on earth richer in personnel who know the value of oil rigs than the United States Gulf Coast.

6. As to the value of the BREMEN at the end of the voyage (material in determining the amount of the limitation fund and as a factor in fixing any salvage award), Zapata's evidence will include the testimony of Capt. A. Holm-Anderson of New York and Mr. Jack Mowbray also of New York. (A. 148). Unterweser's evidence will probably include the testimony of marine surveyor Harry Reinecke of New Orleans, who surveyed the BREMEN for its value at Unterweser's request. (A. 148).

7. As to the amount of the loss Unterweser sustained as a result of the damage to the BREMEN's towing gear, both parties can call upon Mr. Thomas A. Addison, a marine surveyor of Tampa, who was jointly engaged to survey that damage. (A. 147).

8. As to the amount to which Unterweser is entitled for tow hire, all material testimony has been preserved by the depositions already taken. So, this will be largely a matter of mathematical calculation.

9. As to the alleged salvage services rendered by Unterweser in re-establishing the towing connection and the surrounding circumstances, the evidence must consist of the testimony of the crew of the BREMEN and of the riding crew of the CHAPARRAL. All of this testimony has been preserved in depositions.

Upon consideration of the foregoing facts the district court found that *the balance of convenience is strongly in favor of litigation in Tampa.* (A. 227).[51]

Reese says a forum clause should be enforced:

> ". . . unless the court finds the selected state would be an inappropriate, or *manifestly inconvenient,* place for the suit. . . . Likewise, effect should be denied the clause *if the selected state is a seriously inconvenient one* for the trial of the action, as might be true in a situation where the occurrence sued upon took place in a distant place from which, if the trial were to be held in the selected state, it would be necessary to transport large numbers of witnesses.[51a]

The Model Choice of Forum Act of the National Conference of Commissioners on Uniform State Laws (1968) provides that suit brought in a state other than the selected state should be dismissed, unless the selected state *"would be a substantially less convenient place for the trial"* than the state in which the suit had been brought. 17 Am. J. Comp. L. 294-295 (1969). (emphasis added)

Judge Wisdom, dissenting from the panel decision, seems to agree with this principle, saying: "Is the designated forum *seriously inconvenient* for the trial of the action? Since we recognize in the doctrine of *forum non conveniens* that a jurisdictionally selected forum should sometimes give way to another in the face of strong arguments of convenience, *it would be anomalous to ignore those considerations where the parties have selected a forum without the benefit of hindsight.*" (A. 268, 269). (emphasis added)

---

[51] On the facts, Unterweser offered the district court one affidavit of von Aswegen stating: that the BREMEN was built in Germany, her home port was in Germany, the BREMEN's crew were German; and von Aswegen's opinion that the forum clause constituted the "balance of convenience". (A. 21-23).

[51a] Reese, *supra.*

The evidence shows that trial in London would be seriously inconvenient. Thus, enforcement of the forum clause here would be unreasonable, even under the "modern rule". The district court's words were: "the balance of convenience" is strongly in favor of Tampa. (A.277).

Regarding the Citizenship of the Parties and the Nationalities of the Parties

Zapata is incorporated in Delaware, with its principal office in Houston, Texas. (A.58). 97% of the stock is owned by citizens of the United States. (A.58). The CHAPARRAL is registered under the laws of the United States and its home port is Houston, Texas. (A.59;61). The crew employed by Zapata to ride the CHAPARRAL on the intended voyage were citizens and residents of the United States. (A.145).

Unterweser is a limited liability company organized under the laws of West Germany. All of the crew of the BREMEN, the two seamen who were detailed from the BREMEN to serve as riding crew of the CHAPARRAL, and Marine Superintendent Litwinski, who also rode on the CHAPARRAL, were citizens and residents of West Germany. The BREMEN is registered under the laws of West Germany with a home port at Bremerhaven.

As to the Country With Which the Subject Matter of the Litigation Has the Most Significant Contacts

Only the United States and Germany have anything which might be realistically considered contacts with the subject matter of the litigation. The CHAPARRAL was built in the United States. She was made ready for the voyage on the Mississippi River in Louisiana. After the casualty she was brought to a U. S. port of refuge and surveyed. She was repaired in the U. S. The accident

occurred roughly halfway from New Orleans to Key West. Her owner is an American corporation. Approximately 40 witnesses as to the preparations for the voyage, the events of the voyage, the cost of repairs and the value of both the BREMEN and the CHAPARRAL, live in this country.

The crew of the BREMEN and Marine Superintendent Litwinski, whose depositions have been taken, are residents of Germany.

There is nothing English in the picture (except the contract is written in English). No English company, no English crew members, no English preparations, no English performance and no English witnesses (with the possible exception of one expert witness engaged by Unterweser to observe during the testimony of the American riding crew of the CHAPARRAL).

So far as appears, no witness to any operative fact resides in England. And England is about 4000 miles from the scene of the accident.

Regarding Performance Under the Contract

Performance was intended to commence in the United States and to continue across the seas to a point off Ravenna, Italy. In any event, performance commenced in the United States with the preparation of the CHAPARRAL for the tow and continued in the United States from the time the BREMEN got underway with the CHAPARRAL in tow until the flotilla passed out of the territorial waters of the United States into the Gulf of Mexico. Performance, at least in one sense, in the United States was resumed when the flotilla reentered United States waters on the approach to Tampa Bay. From Unterweser's point of view, performance doubtless began with the outfitting

of the BREMEN for the voyage in Germany, and continued with the dispatch of the BREMEN from Bremerhaven to New Orleans to be in position to undertake the tow when the CHAPARRAL was ready.[52]

Summary Regarding Reasonableness

Upon a consideration of the forum clause, the factors above discussed, and Unterweser having filed suit for limitation of liability, the district court denied Unterweser's Motion to Stay, holding:

> "Although Unterweser again argues in its Motion to Stay that the venue provisions of the towage contract are controlling, this Court has already passed on that contention.[53] While at that time the Court did not rule

---

[52] See pp. 8-9 of this Brief for details of performance under the contract by Zapata's and Unterweser's employees.

[53] In its Memorandum and Order entered in Zapata's first filed suit, the court denied Unterweser's motion (1) to dismiss for lack of jurisdiction, (2) requesting the court to decline to exercise its jurisdiction on the ground of forum non conveniens, and (3) to stay pending submission to the English court. The court held:

> "The citizenship of the parties has been given. Plaintiff chose and obtained the jurisdiction of this Court. The prelude, including a partial performance, alleged casualty and aftermath here all occurred along or near the Gulf Coast of the United States of America and within or adjacent to the jurisdiction of the judicial circuit of which this Court is a part.
>
> "A great majority, if not all, of the witnesses are or were in the United States, including an alleged forty potential witnesses residing permanently here. Members of the Bar of this Court have spent considerable time in the investigation and preparation of the trial of this case, 33 oral depositions have been taken; including all of the officers and members of the crew of Defendant's tug and the Defendant's riding crew on Plaintiff's drill barge. *Defendant itself has taken oral depositions and with the aid of this Court obtained production of documents, plans and other data.*
>
> "Plaintiff has made an undisputed showing that English courts apply different tests and rules of liability in cases of this type than do many of the courts of this country." (emphasis added)

> that Unterweser could not proceed with an action in the London Court, the same considerations recited as a basis for retaining jurisdiction in the Order of July 29, 1968, are determinative of this issue. *In addition, Unterweser has voluntarily invoked this Court's jurisdiction in filing this limitation proceeding* in which Zapata has filed claim and answer and joined issue, and also Unterweser has invoked this Court's jurisdiction in filing its counterclaim against Zapata upon which issue has also been joined." (emphasis added)

Zapata submits the district court acted within its lawful judicial discretion in so doing. At the very least, the foregoing factors show the court did not abuse its discretion. Unterweser has presented no argument that the court abused its discretion.

However, Unterweser does argue that the district court erred in denying Unterweser's motion for stay because it acted upon wrong principles of law, mistakenly assigned to Unterweser the burden of proof and considered irrelevant factors in reaching its decision. Unterweser argues further that the Court of Appeals misconceived the law in affirming the decision of the district court.

In the next section of this brief we present Zapata's response to those arguments.

IV

Unterweser's Attack on the Decisions Below Urges a Focus on Circumstances at the Time of Negotiation of the Contract, Which No Court Has So Far Approved. This Argument Disregards the Fact That the District Court Looked to the Factors Considered by Courts Which Have Followed the "Modern Rule" and Considered Them at the Time of Litigation in Keeping with the Universal Practice.

Unterweser's argument is that the decisions below should

be reversed because forum clauses are (or should be) valid *per se*. It necessarily proceeds on the premise that Unterweser's forum clause would have been enforced if the courts below had (1) considered it was valid per se, and (2) cast upon Zapata the burden of demonstrating that enforcement would, in this case, be unreasonable.

Zapata submits that the presumption of validity for which Unterweser argues and the burden of proof of unreasonableness are in fact but two facets of the same question: Whether evidence that enforcement of the forum clause would be reasonable, or not, should be introduced first by the party seeking enforcement or by the party seeking to avoid enforcement? It seems that Unterweser would have this court hold that there is an irrebuttable presumption of the validity of a forum clause without, however, stating the point so baldly.

Zapata, recognizing that some courts have followed the "modern rule", was not content to rely upon the established or majority rule that forum clauses are invalid *per se*, but went on to make a record of the facts which tend to the conclusion that enforcement in this case would be unreasonable, including: (1) the name and addresses of prospective witnesses with an indication of the subject matter as to which each was to testify (A.50-57, A.144-148); (2) an indication of Zapata's view of the manner in which the forum clause came to be in the contract, (A.62-64); (3) the affidavits of an expert on English law regarding the enforceability of exculpatory clauses in England, (A.65-70), and the amount of the English limitation fund, (A. 324-329); (4) the American ownership of the CHAPARRAL, (A.58-61); and (5) a recapitulation of the pretrial work which had been done in the Tampa court: (A. 148-151).

Unterweser, unless protected in its insistence on the

London forum by an irrebuttable presumption of validity of the forum clause, then surely had a duty to present to the district court such facts as Unterweser considered relevant on the question of reasonableness. The only offering made by Unterweser was the affidavit of Mr. von Aswegen.

The district court thus had for consideration the forum clause, the points or factors submitted by Zapata, and those made in Mr. von Aswegen's affidavit.

The point here is that once a party resists enforcement of a forum clause with evidence that enforcement would be unreasonable, even if that clause travels under a presumption of validity, the other party has the responsibility of showing the court the evidence which seems to that party to show enforcement would not be unreasonable. In Point III we analyzed (1) the factors the "modern rule" courts have considered bearing on the reasonableness of enforcement; (2) the evidence as to such factors presented in this case; and (3) the decision of the courts below. Zapata submits that it carried the burden of showing that enforcement would be unreasonable.

That the courts below spoke in terms of "convenience", rather than "reasonableness", should not obscure the fact that those courts considered all of the factors called for in application of the "modern rule". They concluded that the district court should not stay the parties from litigating all the disputes in Tampa so that they could litigate some of them in London.

It cannot be argued fairly that the district court was not aware of the "modern rule" and of the principles followed by the courts in using it. It surely knew that Unterweser was strongly urging enforcement of the forum clause. Just as surely it knew that Zapata contended enforcement

would be unreasonable, and devastating to Zapata's prospects of any recovery for its loss. It knew what the circumstances surrounding the voyage were.

On the one hand the district court had the (1) forum clause; (2) the residence of the crew of the BREMEN (whose testimony has been preserved by deposition); and (3) the nationality of the BREMEN and of its corporate owner. On the other hand, that court had (1) the 40-odd witnesses who were resident in the United States (ten of whom had been deposed); (2) the nationality of the CHAPARRAL and its owner; (3) the contacts between the subject matter and the United States; and (4) the effect on any recovery by Zapata reasonably to be anticipated if the case were sent to London. These factors cannot, of course, be weighed in any mechanical scale. The trial judge simply had to use his best judgment as to what would produce a right result in this case. And that is what he did.

Unless this Court is ready to say that the presence of a forum clause in such a contract outweighs all evidence tending the other way, a result that even Judge Wisdom does not urge, then it seems that the decision has to flow from a consideration by this Court whether the district judge abused his discretion. And that discretion may not be disturbed unless abused. *Charter Shipping Co., Ltd.*, v. *Bowring, Jones & Tidy, Ltd.*, 281 U.S. 515 (1930); 5A, C.J.S., Appeal and Error, § 1583, p. 24 (1958 Ed.)

Unterweser's suggestion that the Court of Appeals erred in determining that reasonableness of the clause must be determined by the exclusive application of the factors considered under the doctrine of *forum non conveniens* seems illusory, because the very same factors are considered in determining whether the enforcement of a forum clause is reasonable as are considered when the question is raised in the *forum non conveniens* context.

A close reading of Unterweser's brief shows that Unterweser does not argue that other factors should be considered, but merely that the factors should be considered in the light of the circumstances *existing at the time of contract*. In urging this proposition, Unterweser takes leave of its champion, Judge Wisdom, who said, dissenting, that ". . . it would be anomalous to ignore those considerations [of convenience] where the parties have selected a forum without the benefit of hindsight". (A. 269).

Suppose the district court had said "enforcement is unreasonable" in announcing its decision, rather than "the balance of convenience is strongly in favor of litigation in this forum", having considered precisely the same factors which he did consider in this case. The ingredients would have been the same and the result would have been the same. To hold that the court committed error because it spoke of the "balance of convenience" instead of the "unreasonableness of enforcement" is to enhance phraseology over substance and to place an unwarranted premium on a particular choice of words.

Consideration of which party has the burden of proof has limited significance in this case, because the district court found the balance "strongly" in favor of litigation in Tampa. As we analyze it, the burden of proof would be important if the court considered the other factors equally divided and that something was needed to tip the scales.

In short, if it be held that Unterweser did not waive any right it may have had to enforcement of the forum clause by (1) conducting discovery on the merits in the first suit, and (2) suing for limitation of liability, enforcement should be denied because it would be unreasonable. The courts below considered the factors which bear on reasonableness. They are the same factors that bear on convenience. The district court felt the factors prepon-

derated strongly in favor of retention. In this context, the issue does not turn on a decision as to which party had the burden of proof.

Rebuttal

In this section Zapata proposes to do no more than state the counterpoints to subsidiary points Unterweser has urged.

The Szukhent Case

As its first reason for granting the writ, Unterweser said the decision of the court of appeals *irreconcilably* conflicts with this Court's decision in *National Equipment Rental, Ltd.* v. *Szukhent,* 375 U.S. 311 (1964). See Pet. for Writ of Cert., p. 13. In that case Mr. Justice Stewart noted:

> "The only question now before us is whether the person upon whom the summons and complaint were served was 'an agent authorized by appointment' to receive the same . . ."[54]

and went on to hold: ". . . we have concluded that Florence Weinberg was 'an agent authorized by appointment . . . to receive service of process', and accordingly we reverse the judgment before us."[55] In discussing the decision Justice Stewart said: ". . . it is settled . . . that parties to a contract may agree in advance to submit to the jurisdiction of a given court. . . ." But the principle mentioned in that decision is not involved, much less disputed, by Zapata or denied by the court of appeals in this case. Judge Wisdom recognized the irrelevance of *Szukhent* when he said (A. 260):

> "Szukhent is not significant authority, however, because the Court was faced with the question whether New York courts had jurisdiction, *not whether other courts should decline jurisdiction.*" (emphasis added)

[54] 375 U.S. at 313.
[55] ibid. 314

Comity

Unterweser says that under the circumstances of this case, United States public policy dictates that its courts give effect to the principle of comity.

This Court has expressed itself on such questions in unambiguous terms, where, *in a case like this, the contract was to be performed in part in the United States.* In *The Kensington,* 183 U.S. 263 (1902), the shipowner sought to enforce provisions exonerating it from liability for its own negligence. Such provisions were valid under Belgian law for which the contract stipulated. This Court *refused* enforcement on grounds of public policy, holding neither *comity* nor the will of the parties can set at naught the public policy of the United States. As the Court summed it up (at 269):

> "The contention amounts to this: where a contract is made in a foreign country, *to be executed at least in part in the United States,* the law of the foreign country, either by its own force or in virtue of the agreement of the contracting parties, must be enforced by the courts of the United States, even although to do so requires the violation of the public policy of the United States. To state the proposition is, we think, to answer it. It is true, as a general rule, that the *lex loci* governs, and it is also true that the intention of the parties to a contract will be sought out and enforced. But both these elementary principles are subordinate to and qualified by the doctrine *that neither by comity nor by the will of the contracting parties can the public policy of a country be set at naught."*[56] (emphasis added)

Surely "comity" does not require the district court to stay Unterweser's limitation action so as to send Zapata to a forum where it cannot recover for Unterweser's negligence.

---

[56] In accord: *Oceanic Steam Nav. Co.* v. *Corcoran,* 9 F.2d 724 (2nd Cir. 1925), relying on *The Kensington,* supra.

CONCLUSION

The decision of the United States Court of Appeals for the Fifth Circuit should be affirmed. Unterweser should be required to refrain from prosecuting the suit which it commenced in London until its limitation of liability action in the United States has been determined.

Respectfully submitted,

James K. Nance

JAMES K. NANCE

and

DEWEY R. VILLAREAL, JR.

Attorneys for Respondent

Of Counsel:
BAKER & BOTTS
3000 One Shell Plaza
Houston, Texas 77002

and

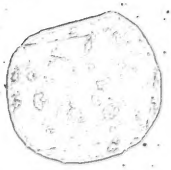
FOWLER, WHITE, GILLEN,
HUMKEY, KINNEY &
BOGGS, P.A.
P.O. Box 1438
Tampa, Florida 33601

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of this Brief have been furnished by airmail postage prepaid to David C. Kerr and Jack C. Rinard of Macfarlane, Ferguson, Allison & Kelly, 512 Florida Avenue, P.O. Box 1531, Tampa, Florida 33601 and to Warren M. Faris and J. Y. Gilmore, Jr., of Faris, Ellis, Cutrone, Gilmore and Lautenschlaeger, 1207 Whitney Building, New Orleans, Louisiana 70130, Attorneys for Petitioner, this 20th day of January, 1972.

James K. Nance

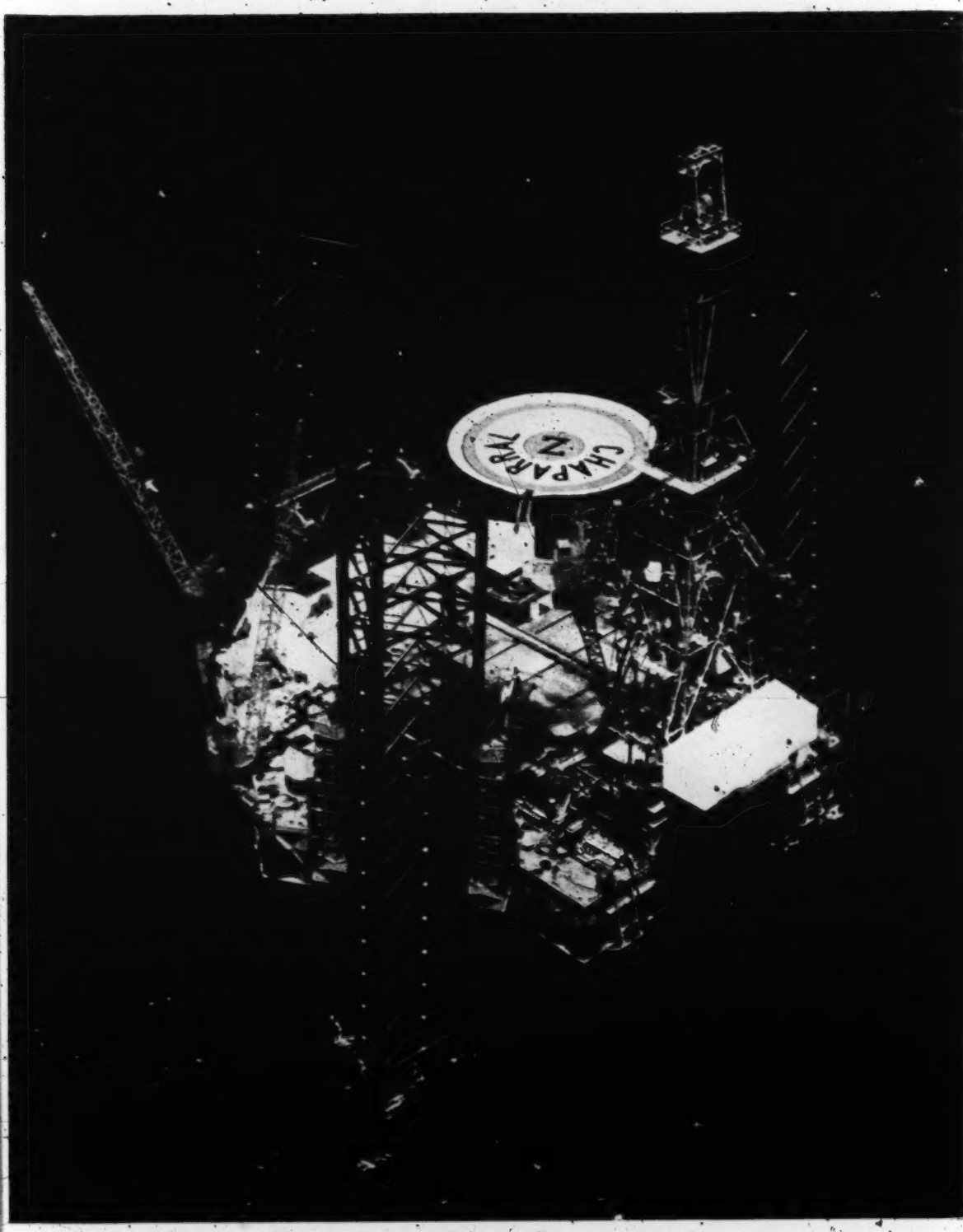
JAMES K. NANCE,
Attorney for Respondent



APPENDIX A

Leg locking devices, welded on deck of CHAPPARRAL. Anchored in Tampa Bay, January 13, 1968. (p. 263, Otto Litwinski deposition).

CHAPARRAL in its damaged condition in Tampa Bay, January 13, 1968.
(p. 176, Otto Litwinski deposition).



Prior to casualty — CHAPARRAL in drilling position, legs lowered. (p. 261, Otto Litwinski deposition).

IN THE

Supreme Court of the United States

No. 71-322

In the Matter of the Complaint of
UNTERWESER REEDEREI, GMBH, for Exoneration
From or Limitation of Liability as Owner
of the M/S BREMEN

UNTERWESER REEDEREI, GMBH
Petitioner,
v.
ZAPATA OFFSHORE COMPANY
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

DAVID C. G. KERR
of MACFARLANE, FERGUSON,
ALLISON & KELLY
Post Office Box 1531
Tampa, Florida 33601
Counsel for Petitioner

JACK C. RINARD
of MACFARLANE, FERGUSON,
ALLISON & KELLY
Post Office Box 1531
Tampa, Florida 33601
Of Counsel for Petitioner

WARREN M. FARIS and
J. Y. GILMORE, JR.
of FARIS, ELLIS, CUTRONE,
GILMORE & LAUTENSCHLAEGER
1207 Whitney Building
New Orleans, Louisiana 70130
Of Counsel for Petitioner

FREE PRESS PUB. CO., INC., TAMPA, FLORIDA

INDEX TO BRIEF

Page

Preliminary Statement 1

Reply to Statement of Fact 1

REPLY

Reply to Point I 2

A. Unterweser Properly Preserved Its Position In District Court And Undertook No Acts Which Would Preclude It From Insisting That The Towage Contract Be Enforced 2

B. Unterweser, In Its Complaint For Limitation, Preserved Its Legal Position; Did Not "Submit" The Controversy To The District Court; And Did Not "Waive" Its Rights To Seek Enforcement Of The Forum Provision 4

C. Limitation By Answer Affords No Protection In Multiple Claim Cases, And In Any Event Limitation By Answer Is Fraught With Risk 7

Reply to Point II 9

A. The Forum Provision Of The Towage Contract Is Unambiguous And Is All-Inclusive 9

B. Irrespective Of Whether The Forum Clause Covers In Rem Disputes, Zapata Has Received The Advantage Of In Rem Procedure 9

Reply to Point III 11

A. The "Public Policy" Of The United States Expressed In Bisso Is Inapplicable To This Case; If Bisso Was Intended To Cover Inter-

national Contracts The Holding Should Be Reassessed 11

B. London - The Contractual Forum - Is No More Inconvenient To The Parties Than Is Tampa - The Fortuitous Forum 15

Reply to Point IV 17

A. The Courts Below Failed To Consider That The Forum Clause Was Part Of A Freely Negotiated Contract; Failed To Consider That The Forum Clause Was An Essential Ingredient Of Contract Consideration; And Failed To Consider That The Initial Forum Was The Contract Forum And Not Tampa 17

B. The Kensington Has No Applicability To The Towage Contract 19

Conclusion 20

INDEX TO AUTHORITIES

CASES	Page
Baltimore & O. R. Co. et al v. Thompson et al, 80 F.Supp 570 (E.D.Mo. 1948)	2
Beaunit Mills, Inc. v. Industrias Reunidas F. Matarazzo, 23 F.R.D. 654 (S.D.N.Y. 1959)	2
Bisso v. Inland Waterways Corp., 349 U.S. 85 (1959)	11, 12, 13
Blank v. Bitker, 135 F.2d 962 (7th Cir. 1943)	2
Calcasieu Chemical Corporation v. Canal Barge Company, 404 F.2d 1227 (7th Cir. 1969)	13
Carbon Black Export, Inc. v. The S. S. Monrosa, 254 F.2d 297 (5th Cir. 1958)	9
Central Contracting Co. v. C. E. Youngdahl & Co., 209 A.2d 810 (Pa. 1965)	18
Fluor Western, Inc. v. G. & H. Offshore Towing Co., 447 F.2d 35 (5th Cir. 1971)	13
Gulf Oil Corp. v. Gilbert; 330 U.S. 501 (1947)	18
Hasse v. American Photograph Corporation, 299 F.2d 666 (10th Cir. 1962)	2, 7
Heiss v. Nielsen, 132 F.Supp. 541 (D. Neb. 1955)	2
Kutger v. United States, 169 F.Supp. 104 (N.D. Fla. 1958)	7
Mittenthal v. Mascagni, 66 N.E. 425 (Mass. 1903)	18
Neifeld v. Steinberg, 438 F.2d 423 (3rd Cir. 1971)	2, 7
Oceanic Steam Navigation Co. v. Corcoran, 9 F.2d 724 (2nd Cir. 1925)	19

Seaboard Coast Line R.R. v. Tennessee Corp.,
421 F.2d 970 (5th Cir. 1970) 13

Slade, Inc. v. Samson Towing Company,
327 F.Supp. 555 (E.D.Tex. 1970) 13, 14

Sun Oil Co. v. Dalzell Towing Co.,
287 U.S. 291 (1932) 12

Tenneco Oil Co. v. Tug Tony,
324 F.Supp. 834 (S.D. Tex. 1971) 13

The Kensington,
183 U.S. 263 (1902) 19, 20

The Monrosa v. Carbon Black Export, Inc.,
359 U.S. 180 (1959) 9, 10

The Scotland,
105 U.S. 24 (1881) 7

Statutes

Title 28 U.S.C. §1292, 72 Stat. 1770 4

Title 46 U.S.C. §185, 49 Stat. 1480 4

Rule 12, Federal Rules Civil Procedure, U.S.C.A. .. 2

Rule 13, Federal Rules Civil Procedure, U.S.C.A. .. 7

Other Authorities

Gilmore & Black, The Law of Admiralty,
(1957), pp. 684-685 ..... 7, 8

1 Benedict on Admiralty, (6th ed.) §89 10

Zammit, *The Validity of the "Pilotage Clause" in Docking Assistance Contracts*, Journal of Maritime Law and Commerce (Vol. 3, No. 1, p. 71, Oct. 1971) 13

IN THE

Supreme Court of the United States

No. 71-322

In the Matter of the Complaint of
UNTERWESER REEDEREI, GMBH, for Exoneration
From or Limitation of Liability as Owner
of the M/S BREMEN

UNTERWESER REEDEREI, GMBH
Petitioner,
v.
ZAPATA OFFSHORE COMPANY
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

PRELIMINARY STATEMENT

Unterweser's references to the parties and the record in this reply brief are consistent with references utilized in its main brief. Unterweser will reply seriatim to the issues raised by Zapata.

REPLY TO STATEMENT OF FACT

It must be emphasized that no court has made any determination on the merits of this case. Zapata, through use of "contentions" and "factual allegations" seeks to establish negligence by presupposition.[1] The

[1] Zapata even concludes its brief on this false note: "Surely 'comity' does not require the district court to stay Unterweser's limitation action so as to send Zapata to a forum where it cannot recover for Unterweser's *negligence.*" (Zapata Brief, 47) (emphasis added).

thrust of Zapata's argument is that Unterweser should be punished for its presupposed negligence by refusal to give effect to the forum provision in the Towage Contract.

Unterweser has valid defenses as to the merits of Zapata's claim, and Unterweser's contentions and factual allegations conflict with those of Zapata. Neither Zapata's nor Unterweser's allegations and contentions on the merits are before this Court, nor are they material or relevant to the issues involved in this appeal, and discussion of the substantive contentions of each party serves no useful purpose.

REPLY TO POINT I

A. Unterweser Properly Preserved Its Position In The District Court And Undertook No Acts Which Would Preclude It From Insisting That The Towage Contract Be Enforced.

On January 29, 1968, Unterweser filed its first pleading in the initial action—its motion to dismiss, or alternatively, for entry of an order declining jurisdiction or staying the prosecution of the initial action. (A. 19). Upon filing that motion, Unterweser's right to contest the propriety of the Tampa forum was protected. Rule 12, Federal Rules of Civil Procedure; *Neifeld v. Steinberg,* 438 F.2d 423 (3rd Cir. 1971); *Hasse v. American Photograph Corporation,* 299 F.2d 666 (10th Cir. 1962); *Blank v. Bitker,* 135 F.2d 962 (7th Cir. 1943); *Beaunit Mills Inc. v. Industrias Reunidas F. Matarazzo,* 23 F.R.D. 654 (S.D.N.Y. 1959); *Heiss v. Nielsen,* 132 F.Supp. 541 (D. Neb. 1955); *Baltimore & O. R. Co. et al v. Thompson et al,* 80 F. Supp. 570 (E.D. Mo. 1948).

In view of circumstances existing during the early stages of the initial action, and by the very nature of a

limitation proceeding as hereinafter discussed, Zapata's waiver argument is without merit. From the outset, Zapata has laboriously detailed its own efforts in this litigation, the number of depositions which it took and in which Unterweser was represented, and the fact that Unterweser also noticed and took depositions. Zapata ignores that Unterweser initially endeavored to have the depositions of crew members of BREMEN postponed until the District Court had disposed of Unterweser's motion to dismiss or decline jurisdiction.

On January 29, 1968, Unterweser also moved for a protective order seeking to have the *de bene esse* depositions of BREMEN crew members terminated, asserting therein its motion to dismiss or decline jurisdiction. (A. 29). Zapata countered by moving on the same date for an order compelling Unterweser to continue the *de bene esse* depositions. (A. 31). The District Court heard oral argument on these two motions on the date they were filed, and on January 30, 1968, ruled *ore tenus* that the depositions should continue.[2] Unterweser, in arguing its motion for protective order, advised that Zapata's claim could well be tried in some other forum, and in such event the utility of the depositions would be questionable,[3] and that in any event, it would be necessary for Unterweser to redepose many of the same witnesses at some future date after Unterweser had had an opportunity to familiarize itself with the facts and issues of Zapata's claim.

---

[2] The proceedings before the District Court on January 29 and 30, 1968 were transcribed and filed in the initial action on February 15, 1968, (A. 2) which record was destroyed by a fire in the Clerk's office. (See Preliminary Statement to Appendix).

[3] Subsequently, in oral argument on its motion to dismiss or decline jurisdiction, Unterweser unilateraly stipulated that the depositions and discovery which had been accomplished in the early stages of the initial action could be used in London.

In summary, Zapata's "waiver" argument is dispelled by circumstances and invalidated by precedent.

B. Unterweser, In Its Complaint For Limitation, Preserved Its Legal Position; Did Not "Submit" The Controversy To The District Court; And Did Not "Waive" Its Right To Seek Enforcment Of The Forum Provision.

Although recognizing that Unterweser "reluctantly" filed its limitation action, the Court of Appeals held that Unterweser had submitted itself to the jurisdiction of the District Court for the resolution of the entire controversy, and subjected itself to the "full equitable powers of the district court." (A. 237). The decision does not deal with the prejudice caused by the *six month delay* between the filing of Unterweser's motion to dismiss or decline jurisdiction (A. 19) and the entry of the District Court's order on that motion (A. 80); it ignores that a complaint in limitation is defensive; and it fails to consider that Unterweser carefully preserved its legal position in its complaint for limitation. (A. 85).

Zapata argues that irrespective of when the District Court entered its order on Unterweser's motion to dismiss or decline jurisdiction, the six month period specified in 46 U.S.C. §184, 49 Stat. 1480, would have continued to run, and Unterweser would have had to decide, before July 12, 1968, whether or not to file a complaint in limitation. (Zapata Brief 18-19). Had the District Court ruled on Unterweser's motion to stay the initial action within even two or three months after it was filed on January 29, 1968, Unterweser would have had sufficient time to have the order certified pursuant to 28 U.S.C. §1292, 72 Stat. 1770, in order to appeal the District Court's decision *before* it became necessary to consider whether to file a limitation action in the United

States.[4] Such an appeal would have facilitated determination of enforceability of the forum provision without the encumbrance of collateral issues.

A complaint in limitation is defensive. (Wisdom J., dissenting, A. 288, n.5.) Unterweser, by filing the limitation action did not concede liability; at most, Unterweser "invoked" or "preserved" a *defense* within a few days before the right to do so expired, and at a time when it was not known whether the District Court would grant or deny its initial motion. Since a party, under Rule 12, Federal Rules of Civil Procedure, can protect defensive issues such as lack of jurisdiction or venue by motion or answer, it is an anomaly to hold, as did the Court of Appeals, that the implementation of the limitation defense within the statutory period, at a time when jurisdictional and venue issues had not yet

---

[4] Upon the entry of the adverse Order (A. 80) Unterweser timely (August 8, 1968) moved the District Court to certify the question. (A. 84). This motion was denied on January 16, 1969, (A. 84) on the ground that it had been mooted by commencement of the limitation action. While it is not certain that the District Court would have certified its order, in view of subsequent developments it is reasonable to suppose the court would have so acted. In any event, if the court had acted earlier Unterweser would have known whether an interlocutory appeal was available before it was necessary to make the decision to file a complaint in limitation.

been determined, operated as a "submission" or "waiver" of those undetermined issues.[5]

In its limitation complaint Unterweser carefully preserved its right to proceed in London and asserted that English law, or alternatively, German law, was applicable:

> "Accordingly, Plaintiff asserts herein, as it asserted in the pending action by motion filed on January 29, 1968, to dismiss said action on the ground of lack of jurisdiction, or alternatively, for entry of an order declining jurisdiction and/or staying the further prosecution of these proceedings, on which no ruling has been entered to date, that the proper forum for prosecution of claims by the owner of the drill barge CHAPARRAL is the High Court of Justice, London, England. Plaintiff reserves all rights under aforesaid motion and re-asserts herein

---

[5] Judge Wisdom and Mr. Justice Karminsky were of the opinion that Unterweser had not precluded itself from seeking enforcement of the forum clause by filing the limitation action:

> "Unterweser filed a limitation action one week before the time for filing lapsed because the district court had not yet ruled on its motion to dismiss. I do not believe it is thereby estopped from pressing its motion to dismiss." (Wisdom J., dissenting, A. 281).
>
> * * * *
>
> "It is alleged that the Plaintiffs here have to some extent taken part in the Florida proceedings. That is true: they have indeed filed a Petition For Limitation, because if they did not do that within a certain time, namely six months, they would be out of time for limitation before that tribunal. But I have no doubt at all that they have taken no steps in the Florida Court at Tampa, except to protect their position for the future." (Opinion, High Court of Justice, A. 209).
>
> * * *
>
> "The contention that Unterweser should be treated as having assented to the jurisdiction of the local court by filing the limitation action is a red herring." (Wisdom J., dissenting, A. 287).

> that the High Court of Justice, London, England, is the proper forum for determining all rights including that of Plaintiff to be exonerated from or to limit liability, and that in any event, irrespective of the forum, all rights of the parties including Plaintiff's right to be exonerated from or to limit liability must be determined in accordance with the law of England or alternatively the law of Germany hereinabove alleged." (A. 92).

Similarly, in its counterclaim, Unterweser reserved its right to proceed in London. (A. 114). The counterclaim, being compulsory, did not serve to waive any rights. Rule 13, Federal Rules of Civil Procedure; *Hasse v. American Photograph Corporation,* 299 F.2d 666 (10th Cir. 1962); *Neifeld v. Steinberg,* 438 F.2d 423 (3rd Cir. 1971).

C. Limitation By Answer Affords No Protection In Multiple Claim Cases, And In Any Event Limitation By Answer Is Fraught With Risk.

Zapata argues that Unterweser could have avoided "submitting" itself to the jurisdiction of the District Court by pleading limitation by answer; yet Zapata recognizes that there existed a clear danger of numerous claims. (Zapata Brief, 13-14). The law is clear that limitation by answer affords complete protection only when all possible claimants are parties to the initial action, and a shipowner, in order to be assured that he might limit his liability to the value of his vessel, must file a complaint in limitation within the statutory period. *The Scotland,* 105 U.S. 24 (1881); *Kutger v. United States,* 169 F. Supp. 104 (N.D. Fla. 1958) (Unterweser Reply Brief in Court of Appeals, 10-12).

Limitation by answer subjects the shipowner to substantial risks even in a case where it is absolutely certain that there will be but a single claim. The dilemma is succinctly stated by Gilmore and Black:

> Pre-1936 practice permitted the Limitation Act to be raised by way of defense as an alternative to an affirmative petition. There are at least three possible constructions of the 1936 preamble as it bears upon the practice of introducing the Limitation Act as a defense: 1) the six months period relates only to procedure when an affirmative petition is filed; hence the pre-1936 practice is still available and the Act may be pleaded as a defense in any suit without reference to time; 2) the six months period applies both to defensive pleading and affirmative petition; hence the Act may be pleaded as a defense but only within the six months period; 3) the filing of a petition for limitation within the six months period is now the exclusive method by which a shipowner may invoke the Limitation Act; hence the possibility of pleading the Act as a defense does not exist even during the six months period, and on receiving notice of claim the vessel owner must if he wishes to avail himself of the Act's protection, promptly file his petition. *On the whole the first solution* (that the pre-1936 practice is not affected by the amendment) *has most to recommend it, but, until the Supreme Court has read the riddle the prudent practitioner should of course assume the worst* (or third solution) *and always proceed by filing his petition within the six months period.* Gilmore and Black, *The Law of Admiralty* (1957), pp 684-685. (emphasis added) (footnotes omitted).

Faced with a $3,500,000 claim, Unterweser could not accept the risk that limitation, asserted by answer, would be invalid. On the date the statute would have run (July 12, 1968) the District Court had not ruled on Unterweser's initial motion; therefore, limitation by answer, if utilized, would have been filed after expiration of the statute.

REPLY TO POINT II

A. The Forum Provision Of The Towage Contract Is Unambiguous And Is All-Inclusive.

Zapata's argument that the forum provision is not all-inclusive or that it is ambiguous, raised in this Court for the first time, is makeweight if not specious. Unterweser brought the explicit language of the forum clause to the attention of the District Court on two separate occasions: First, in its motion to dismiss or decline jurisdiction (A. 19), and in its motion to stay the limitation action. (A. 205). Moreover, the Court of Appeals considered the effect of the forum clause on two separate occasions: in the initial hearing before the three judge panel, and subsequently by the Court *en banc*. Neither the United States courts nor the English courts have found the clause ambiguous. None of the courts have suggested that the forum clause is not preclusive or that the clause does not encompass the action Zapata initiated in Tampa.

B. Irrespective Of Whether The Forum Clause Covers In Rem Disputes, Zapata Has Received The Advantage Of In Rem Procedure.

It is difficult to perceive how the forum clause could be more inclusive; in plain English it covers "Any disputes." To suggest as does Zapata that the forum provision does not cover *in rem* proceedings is without merit. Reliance on *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180 (1959), is misplaced. The bill of lading construed in *Carbon Black*, being a contract of adhesion, is distinguishable from the freely negotiated Towage Contract under consideration. Moreover, as indicated by the Fifth Circuit in its *Carbon Black* decision, 254 F.2d 297, 300, and in its decision below (A. 240), use of *"Any Action"* plainly refers to both *in rem* and *in personam*

suits. Finally, to suggest that a forum clause is intended to cover *in personam* actions and not proceedings *in rem*, is to impute " . . . to the parties the drawing of a distinction the purpose of which is impossible to grasp." *SS Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184-185 (Harlan J., dissenting).[6] The forum clause expressed the clear intent that Unterweser was not to be subjected to *in rem* or *in personam* proceedings in numerous jurisdictions while performing the Towage Contract—*all disputes were to be resolved in London.*

Zapata's suggestion—to hold the forum clause applicable to *in rem* suits would destroy Zapata's right to obtain security—is pure sophistry. Although the forum clause covers proceedings *in rem*, this is not such a significant factor as to furnish a basis for refusal to enforce, for in return for its right to proceed *in rem*, Zapata obtained a very favorable towing rate.[7] (A. 295-297) (Unterweser Brief, 24). In any event, the significant aspect of an *in rem* action is its security value and Zapata has been fully secured; in the initial action by a letter of undertaking in the amount of $3,500,000, and in the limitation action by a bond in the amount of $1,390,000. (A. 19, 95): *And Unterweser advised both the District Court and Zapata that the security posted in Tampa would be made available to Zapata as security for any claim Zapata might wish to initiate in London.* (A. 275). Whatever value the *in rem* claim had for security, that purpose has been fully served.

---

[6] Certainly, "Any disputes" encompasses *all actions.*

[7] Zapata, by emphasis, creates an auroa of inviolability as to *in rem* rights. However, maritime liens may be waived by "agreement or otherwise." Benedict on Admiralty (6th ed.) §89. As Zapata recognizes, the unique function of *in rem* suits is to obtain security for the claim; but once security is obtained the suit is no different from any other.

REPLY TO POINT III

A. The "Public Policy" Of The United States Expressed In Bisso Is Inapplicable To This Case; If Bisso Was Intended To Cover International Contracts The Holding Should Be Reassessed.

Zapata argues that enforcement of the forum provision would be contrary to the "public policy" of the United States, citing *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1963). The possibility that implementation of the forum provision (and the Towage Contract) might contravene some public policy of the United States, when coupled with Zapata's American citizenship, were significant factors in the Court of Appeals' refusal to enforce the agreement. (A. 242-243).

The policy enunciated in *Bisso* has no application in this case; a case involving neither a domestic nor a contract of adhesion. The forum clause was bargained for consideration, Zapata receiving *quid pro quo* in the form of the lowest towing rate. Zapata, an international corporation, is not a ward of the United States courts. Moreover, Zapata and its wholly owned subsidiary contract for foreign forums and application of foreign law. (A. 310-311). The casualty occurred on the high seas, *not* within the jurisdiction of the United States. The presence of Unterweser in United States' jurisdiction results from following Zapata's instructions to come to Tampa subsequent to the casualty, coupled with Zapata's breach of the Towage Contract by commencing the initial action in Tampa.

In view of such significant distinctions, refusal to implement the forum clause on grounds of United States public policy constitutes an unmerited and surely unintended extension of *Bisso*. (A. 272-273).

Unterweser seeks to have all disputes resolved in London and asserts that English law is applicable. Assuming, *arguendo,* that the exculpatory provisions of the Towage Contract would, in accordance with English law, be enforced, this fact is not contrary to *Bisso* or to any public policy of the United States. Indeed, how could action by an English court in passing on an international contract involve the public policy of the United States?

The "public policy" against exculpatory clauses is not so strong as indicated by the Court of Appeals, and it clearly is not as pervasive as argued by Zapata. This Court has in the past recognized the validity of exculpatory provisions in maritime contracts and in *Sun Oil Co. v. Dalzell Towing Co.,* 287 U.S. 291 (1932), in enforcing pilotage clauses, this Court stated:

> "Respondent had no exclusive privilege or monopoly in respect of the services that petitioner desired to have performed for its tanker. And petitioner was under no compulsion to accept the terms of respondent's pilotage clause. There is nothing to suggest that the parties were not on equal footing or that they did not deal at arm's length. 'There is no rule of public policy which denies effect to their expressed intention, but on the contrary as the matter lies within the range of permissible agreement, *the highest public policy is found in the enforcement of the contract which was actually made.*'"
>
> * * *
>
> *"It would be unconscionable for petitioner upon occurrence of a mishap to repudiate the agreement upon which it obtained the service."* 287 U.S. 291, 294-295. (emphasis added).

One commentator notes that distinction between "towage" and "pilotage" is elusive and:

> "... the concept of perfectly valid contractual provisions exempting from all liability for negligence is not foreign to American jurisprudence; ..." Zammit, *The Validity of the "Pilotage Clause" in Docking Assistance Contracts,* Journal of Maritime Law and Commerce (vol. 3, No. 1, p. 71, Oct. 1971) at pages 75-77.

The Fifth Circuit enforces exculpatory clauses which fall without the ambit of its *"mare nostrum."* (A. 242). In *Seaboard Coast Line R.R. v. Tennessee Corp.,* 421 F.2d 970 (5th Cir. 1970), the Court upheld implementation of an exculpatory clause.

Insofar as *Seaboard* v. *Tennessee Corp.* recognized predominate commercial considerations it is no different from this case which involves a new field of towage with unknown dangers and unacceptable risks which must be allocated by contract or insurance.

The validity of exculpatory provisions (and the enforcement of forum clauses) must be resolved by pragmatic consideration of basic economic factors concerning allocation of risk, and not by blind incantation of "public policy." Indeed, the very existence of *Bisso* "public policy" is subject to grave doubt when it can be avoided, by *domestic contracting partners,* through the simple expedient of requiring the owner of the towed object to provide insurance against the tug's negligence. *Fluor Western, Inc. v. G. & H Offshore Towing Co., Inc.,* 447 F.2d 35 (5th Cir. 1971); *Calcasieu Chemical Corporation v. Canal Barge Company,* 404 F.2d 1227 (7th Cir. 1969); *Tenneco Oil Co. v. Tug Tony,* 324 F. Supp. 334 (S.D. Tex. 1971); *Slade, Inc. v. Samson Towing Company,* 327 F. Supp. 555 (E.D. Tex. 1970); *Bisso v. Inland*